(22,965)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 889.

THE TERRITORY OF NEW MEXICO, BY ITS ATTORNEY GENERAL, FRANK W. CLANCY, ON THE RELATION OF JACOBO J. ARAGON, APPELLANT,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1912.

1 Be it remembered, that heretofore on the 21st day of August, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a Transcript of Record in a certain cause therein pending, entitled "The Territory of New Mexico by its Attorney General, Frank W. Clancy, on the relation of Jacobo J. Aragon, vs. The Board of County Commissioners of Lincoln County, New Mexico," portions of which said transcript are in words and figures as follows, to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, 1911.

No. 1410.

THE TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON, Appellant,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO, Appellee.

Appeal from the Sixth Judicial District Court, Lincoln County.

Transcript of Record.

Be it remembered that in the District Court in and for the County of Lincoln certain pleas and pleadings were begun and had therein, in the case of Territory of New Mexico by its Attorney General, Frank W. Clancy, on the relation of Jacobo J. Aragon, vs. The Board of County Commissioners of Lincoln County, New Mexico, in which said cause, on the 24th day of September, A. D. 1910, a verified information was filed in said Court which is in words and figures following, to-wit:

2 In the District Court for the County of Lincoln, Territory of New Mexico.

No. 1976.

TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

To the Honorable Edward R. Wright, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Sixth Judicial District Court thereof, Sitting in the County of Lincoln:

The Territory of New Mexico, by its Attorney General, on the relation of Jacobo J. Aragon, gives the Court to understand and be

informed that Jacobo J. Aragon is a resident in the town of Lincoln, in the County of Lincoln, and Territory of New Mexico, is the owner of a large amount of real and personal property in the said County of Lincoln and is a taxpayer in a large amount of taxes in said county both to the County and Territory of New Mexico; that for a long time heretofore said Board of County Commissioners of Lincoln County, in the Territory of New Mexico, has used and does now use without any lawful warrant, grant or authority the following liberties, privileges and franchises, to-wit: that of changing and establishing the county seat of said Lincoln County from the town of Lincoln to the town of Carrizozo in said county, and of erecting and constructing buildings for a court house and a jail at said town of Carrizozo and of holding sessions of said Board of County Commissioners at said Carrizozo, claiming the same to be the county seat of said county of Lincoln and that the town of Lincoln is not such county seat; at which said last named place, the town of Lin-
3 coln, the said county seat of said Lincoln County has been established and located ever since the organization of said town; and also of preparing buildings and places at said town of Carrizozo for the removal of all of the public offices of said County of Lincoln thereto, and in which to keep and deposit all the public records of said County, and is now erecting buildings for a court house and jail at said Carrizozo to be used ostensibly as a court house and jail of said county for the holding of the sessions of the district court, probate courts, and Board of County Commissioners of said county, and for that purpose is paying out large sums of money to contractors therefor from the public funds of the County of Lincoln, and has also provided buildings and accommodation for holding the District Courts for the County of Lincoln at said town of Carrizozo and is still continuing to do so; that said Board is recognizing the said town of Carrizozo as the county seat of said County of Lincoln, and has, by an order of the said Board, decreed and declared that the said county seat of the said County of Lincoln has been changed by virtue of an alleged election pretended to have been held under its direction and order from the town of Lincoln to the town of Carrizozo in said county; that said change is pretended to have been made in said county seat from said town of Lincoln to said town of Carrizozo by virtue of the provisions of an alleged or pretended act of the Legislative Assembly contained in Chapter 80 of the printed Laws of 1909, which said pretended law was never lawfully enacted and is in violation of the statutes of the United States, as is alleged and claimed by the relator, and as the Territory is informed and believes. Said election was also illegally authorized, ordered or called by virtue of a petition to said Board "to call an election to submit to a vote of the qualified electors of said County of Lincoln
4 the proposition to remove the county seat of said Lincoln County to Carrizozo, a town situated on the El Paso & Southwestern Railroad," and not by virtue of or in accordance with any petition to said Board "asking for the removal of the County seat of said county to some other designated place" or Carrizozo, no such petition asking for the removal of the county seat of said county

to said Carrizozo ever having been presented to said Board. Said election is claimed to be void because no registration of voters was had therefor, and because the county of Lincoln at the time said election was ordered to be held had a court house and jail, the original construction of which had cost that county more than $30,000.00, and the sum of $40,000.00 had not and never has been deposited with the Treasurer of said County for the purpose of erecting a court house and jail and other required public buildings at said Carrizozo. Said alleged change of said county seat from the town of Lincoln to the town of Carrizozo is illegal and contrary to law for many and various other reasons, which will be shown to the court, and therefore, and for many other reasons which will be made manifest to the court upon the hearing of this cause, the said Board of County Commissioners have and are, without authority by law or lawful warrant, grant or legal right, using the liberties, privileges and franchises hereinbefore set forth, which said liberties, privileges and franchises the said Board of County Commissioners have heretofore been usurping, and do now usurp upon the Territory of New Mexico to its great damage and prejudice. Wherefore, the said Attorney General prays the advice and judgment of the said Sixth Judicial District Court, sitting in and for the County of Lincoln in the Territory of New Mexico, in the premises, and that due process of law against the said Board of County Commissioners in this behalf be had, and that it be made to answer unto the Territory of New Mexico by what warrant it claims to have, use and enjoy the liberties, privileges and franchises aforesaid.

JACOBO J. ARAGON, *Relator.*
FRANK W. CLANCY,
Attorney General.
GEORGE B. BARBER,
Lincoln County, N. M.;
T. B. CATRON, *Santa Fe, N. M.,*
Attorney- for the Relator and Informant.

TERRITORY OF NEW MEXICO,
County of Lincoln:

Jacobo J. Aragon, being duly sworn upon his oath, says: that he has read over the foregoing information and knows and understands the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and that as to those matters he believes it to be true; that he is the relator in the foregoing information.

JACOBO J. ARAGON, *Relator.*

Subscribed and sworn to before me this — day of September, A. D. 1910.

JOHN M. PENFIELD,
Notary Public.

My Commission Expires —.

And afterwards, to-wit, on the — day of ——, 1911, the said defendants filed a demurrer in said cause to the said information which is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Lincoln:

In the District Court.

TERRITORY OF NEW MEXICO on the Relation of JACOBO J. ARAGON,
Plaintiff,

6 vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO, Defendant.

The defendant demurs to the information and complaint filed herein and for ground of demurrer shows to the court:

1. That said information and complaint does not state facts sufficient to constitute a cause of action.

2. That plaintiff and all parties aggrieved by the alleged acts of defendant have full and adequate relief and remedy in the usual course of proceedings at law and by the ordinary forms of civil actions.

3. That the said information and complaint does not show or charge that defendant has usurped any office or franchise.

HEWITT & HUDSPETH,
Associate Counsel and Attorneys for Defendant.

And thereafter, the said demurrer coming on for hearing before the Court and the Court having heard arguments pro and con, and being fully advised in the premises, it was ordered, considered and adjudged by the court that the said demurrer be, and the same was, overruled and disallowed, and that the said defendant have leave to answer further said information.

And afterwards, to-wit, on the 18th day of January, 1911, there was filed by the defendant in the said cause an answer to said information, which is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Lincoln:

In the District Court.

7 No. 1978.

TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON
vs.
THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

Information in the Nature of Quo Warranto.

Defendant's Answer.

The defendant comes and in answer to the information and complaint of the plaintiff, says:

1. It denies that the relator, Jacobo J. Aragon, is a large individual tax-payer to the county of Lincoln or to the Territory of New Mexico.

2. That defendant denies on its information and belief, that the information and complaint herein is, in fact, the information and complaint of the Attorney General for and on behalf of the Territory of New Mexico, but defendant alleges, upon like information and belief, that the same was filed and is being prosecuted by the relator, Jacobo J. Aragon, by and through attorneys employed by the said relator and on his behalf.

3. The defendant denies, on its information and belief, that the said relator has such an interest in the matters at issue in this cause as to entitle him to prosecute the same, and to call on this defendant to show why it has exercised and is exercising the franchises and rights named in the information and complaint herein, and it denies the right of said Attorney General to present such information except on behalf of the Territory of New Mexico and it denies his right to so prosecute on the relation of an individual who has no right or interest in the premises.

4. The defendant admits that it has by its order changed the county seat of said Lincoln County from Lincoln and established the same at the town of Carrizozo in said county. It admits that
8 it entered into a contract for the erection of buildings for a court house and jail for said county, at the said town of Carrizozo; it admits that it has held meetings of the Board of County Commissioners at said town of Carrizozo and that it claims the said town to be the county seat of said Lincoln County; it admits that it has been preparing buildings and places at said town of Carrizozo in which to keep and deposit all public records of said county and for holding of the sessions of the District Court, Probate Court, and the Board of County Commissioners, with the intention of removing all

of the public offices of said county of Lincoln to said town of Carrizozo; it admits that it has paid out considerable sums of money to the contractor therefor from the public funds of said Lincoln County, derived from the sale of bonds of said county, issued for that sole purpose by virtue of the statutes of New Mexico herein mentioned, and was so paying out money until restrained by the injunction of this Court; it admits that it has provided buildings for the holding of the District Court for the County of Lincoln at said town of Carrizozo, and still continues so to do.

5. This defendant admits that it has, by its order, declared that said county seat has been changed from the town of Lincoln to the town of Carrizozo and that said change has been made under and by virtue of an Act of the Legislative Assembly of New Mexico contained in Chapter 80 of the Laws of 1909 and the acts to which the same are amendatory.

6. The defendant denies, on its information and belief, that said Chapter 80 of the laws of 1909, failed of lawful enactment, and it denies that the same is in conflict with any of the laws of the United States.

7. This defendant alleges that on the 6th day of July, 1909 and at the regular session of the Board of County Commissioners of said Lincoln County, there was presented to said Board a petition,
9 signed by qualified electors of said county, in number largely in excess of one-half of the legal votes cast at the last preceding general election held in said county, asking for the removal of the County seat of said county to the town of Carrizozo in said county, a copy of which is filed herewith and marked "Exhibit A" and which petition was duly recorded in the records of said county; defendant further alleges that the said town of Carrizozo is more than twenty miles from said town of Lincoln and situated on a line of railroad, while the said town of Lincoln is not so situated.

8. The defendant further alleges that at said meeting of the Board there was presented to it a deed conveying to said County of Lincoln, by a good and perfect title, block eight (8) in the said town of Carrizozo, which block contains more than three-fourths of an acre, which deed of conveyance was then and there accepted by the Board.

9. This defendant denies that said Lincoln County had at that time, public buildings consisting of a court house and jail, the original construction of which cost the county more than thirty thousand dollars, but alleges that such court house and jail originally cost the county much less than that sum as shown and ascertained by and from the records of the Board of County Commissioners of said county.

10. This defendant further alleges that after the presentation of said petition and the acceptance of said deed of conveyance said Board of County Commissioners made an order directing that the proposition to remove the county seat of said county to the town of Carrizozo, the place designated in said petition, be submitted to a vote of the qualified electors of said county at a special election for that purpose, and after having given notice by publication of such

order in the Carrizozo News, a newspaper of general circulation in said Lincoln County, for four consecutive weeks immediately prior to such election and by hand bills caused to be posted at three of the most public places in each precinct in said county, four weeks prior to such election, the same was held on the 17th day of August, 1909. A copy of said order so published and so posted is herewith filed and marked "Exhibit B."

11. The defendant further alleges that in pursuance of said order, so published and posted the election was held on the day aforesaid and on the 23rd day of August, 1909, the Board of County Commissioners of said county met at the county seat and canvassed the votes cast at said election, and it appearing from the returns thereof that Carrizozo had so received for county seat Nine Hundred (900) votes and that Lincoln had received for county seat Six Hundred and Thirteen (613) votes, the returns of such election were thereupon certified by the Probate Clerk to the Territorial Secretary, together with the order of the County Commissioners and a sworn certificate of the publication thereof. A majority of the votes so cast having been in favor of Carrizozo it was declared by the Board of County Commissioners to be the county seat of said Lincoln County. The board thereupon caused a notice to be published in the said Carrizozo News for four consecutive weeks, a copy of which notice is herewith filed and marked "Exhibit C."

Wherefore, defendant prays judgment.

HEWITT & HUDSPETH,
Attorneys for Defendants.

TERRITORY OF NEW MEXICO,
County of Lincoln:

Robert H. Taylor, being duly sworn says that he is one of the County Commissioners of said county, the defendant, that he has read the foregoing answer and knows the contents thereof and that the same is true of his knowledge except as to those matters therein stated on information and belief and as to those matters he believes them to be true.

ROBERT H. TAYLOR.

Subscribed and sworn to before me this 17th day of January, 1911.

EDGAR H. B. CHEW,
Notary Public.

My Commission Expires —.

And afterwards, to-wit, on the 21st day of February, 1911, there was filed in said cause, on behalf of the plaintiff, a reply to the foregoing answer, which is in the words and figures following, to-wit:

In the District Court for the County of Lincoln, Territory of New Mexico.

No. 1976.

TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

Information in the Nature of Quo Warranto.

Comes the plaintiff in the above entitled cause, and for reply to the answer of the said defendants therein says, that it denies each and every allegation of new matter in the said answer, if any there be therein, but protests that there is no new matter therein which needs a reply.

F. W. CLANCY,
Attorney General.
T. B. CATRON,
Santa Fe, N. M.,
Counsel.

And immediately thereafter the said Court rendered and entered judgment in said cause in words and figures following, to-wit:

12 TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

The above entitled cause coming on for hearing upon the evidence and stipulations introduced in evidence and upon the findings of fact and conclusions of law made by the court, and the Court being fully advised in the premises, it is ordered, considered and adjudged that the Writ of Quo Warranto applied for by the said plaintiff be not allowed or issued and that the information of the said plaintiff, filed, praying for the said Writ of Quo Warranto be, and the same hereby is dismissed, and that the said defendant go hence without day and that it do have and recover of the said plaintiff its costs in this behalf laid out and expended to be taxed and that it have proper process of the court therefor.

E. R. WRIGHT,
Judge of the Sixth Judicial District
Court, Territory of New Mexico.

Afterwards and immediately upon the rendering and entering of the judgment last above recited, the plaintiff in open court

and while court was still in session at the rendition of said judgment applied to the court and prayed for an appeal from said judgment to the Supreme Court of the Territory, which motion was granted and appeal allowed in the words and figures following:

TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

The plaintiff in the above entitled cause having applied to the court for, and prayed for an appeal in the above entitled
13 cause from the judgment rendered and entered therein, in open court, at the time of the rendering and entering of said judgment and the court being fully advised in the premises sustained said motion or prayer for appeal, it is therefore ordered, considered and adjudged that the appeal applied for and prayed for in the above entitled cause from the final judgment rendered therein by the said plaintiff be, and the same hereby is granted and allowed, and the Clerk of the Court directed to prepare and transmit to the Clerk of the Supreme Court the proper transcript of record in said cause.

E. R. WRIGHT,
Judge of the Sixth Judicial District Court, Territory of New Mexico.

TERRITORY OF NEW MEXICO,
County of Lincoln:

This is to certify that the foregoing 27 pages and part of one page of typewritten matter contains a true, perfect and complete record and copy of all of the evidence, pleadings and procedure which were had in the District Court for the County of Lincoln, Territory of New Mexico, in the above entitled cause, as set out at the caption thereof, to-wit:

TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

except so much of the evidence as was omitted therefrom by agreement and stipulation which was signed by the parties at the time and is attached hereto.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of the Sixth Judicial District Court this the 19th day of July, A. D. 1911.

[SEAL.]

CHAS. P. DOWNS,
Clerk of the Sixth Judicial District Court, Territory of New Mexico.

14 And afterwards, to-wit, on the 10th day of August, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an Assignment of Errors in the above entitled cause, which said Assignment of Errors was and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, 1911.

THE TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOB J. ARAGON, Plaintiff.

VS.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO, Defendants.

Appeal from the Sixth Judicial District Court, Lincoln County.

Comes the plaintiff in the above entitled cause and says that manifest error has intervened in the trial of said cause in the District Court for the County of Lincoln against the rights and interests of the said plaintiff, in this.

1. The court erred in rendering judgment in favor of the defendant and in dismissing the said Information, instead of rendering judgment in favor of the plaintiff in said cause.

2. The Court erred in not finding, as a conclusion of law, that Chapter 80, as it was pretended to have been amended and printed in the Laws of 1909, had never been lawfully enacted.

3. The Court erred in failing to find as a conclusion of law, that Chapter 80, as it was pretended to have been amended and printed in the Laws of 1909, had not become a law of this Territory.

4. The Court erred in failing to find, as a conclusion of law, that Chapter 80, as it was pretended to have been amended and printed in the Laws of 1909, even if it was otherwise legally enacted, was a special or local law and in contravention of the Statutes of the United States prohibiting any special or local legislation in this Territory in reference to changing of county seats.

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5. The Court erred in not finding, as a conclusion of law, that the petition which was presented to the Board of County Commissioners praying the Board "to call an election to submit to a vote of the qualified electors of said County the proposition to remove the county seat of said Lincoln County to Carrizozo, a town situated on the El Paso & Northwestern Railroad," was not such petition as the statute required to authorize the calling of a special election to vote on the proposition to change the county seat of said county, in said county.

6. The Court erred in failing to find, as a conclusion of law, that no petition "asking for the removal of the county seat of said County to some other designated place", or to Carrizozo, having been presented to said Board, that said Board was without jurisdiction to call an election to vote on the proposition of the change

of the county seat to Carrizozo, and that therefore the election which was pretended to have been held was illegal and void, and that the order changing the said county seat or declaring it to be changed, to Carrizozo, was illegal and void.

7. The Court erred in not finding, as a conclusion of law, that the said pretended election in reference to the change of the county seat of said county having been held without any registration of the voters therefor, that the same was illegal and void, and that the order for the change of said county seat or declaring it to be changed, given by said Board, was without authority of law and had no legal binding, force or effect.

8. The Court erred in not holding as a conclusion of law that before any election could be held for the change of a county seat there must be a registration of the qualified voters for said election, as declared by law.

16 9. The Court erred in not finding as a conclusion of law that the county seat of Lincoln County was still at Lincoln and had not been legally changed or authorized to be changed to Carrizozo or any other place.

10. The Court erred in many divers and sundry other holdings, findings and conclusions made and determined by it on the trial of said cause.

Plaintiff therefore prays that the judgment of the court below may be reversed, and that judgment be entered here- in favor of the said plaintiff in said action, and maintaining the county seat at the said town of Lincoln, and that it may have such other relief as it is entitled to under the facts in said cause.

THE TERRITORY OF NEW MEXICO,
By F. W. CLANCY, *Its Attorney General;*
By T. B. CATRON, *Counsel for Plaintiff.*

And afterwards, to-wit, on the 10th day of August A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a certified copy of the appeal bond in the above entitled cause, which said Appeal Bond was and is in the following words and figures, to-wit:

Know all men by these presents, that we Jacobo J. Aragon as principal, and H. Lutz and Lola S. Norman as his sureties are held and firmly bound unto the Board of County Commissioners of the County of Lincoln, Territory of New Mexico in the sum of One Thousand Dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally firmly by these presents:

Sealed with our seals and dated this 29th day of March,
17 A. D. 1911.

The condition of the above obligation is such that whereas, the plaintiff in the case of the Territory of New Mexico by Frank W. Clancy, her Attorney General, on the relation of Jacob J. Aragon, against the Board of County Commissioners of the County of Lincoln, Territory of New Mexico, being an information in the

nature of quo warranto has appealed from the judgment of the District Court in said case dismissing said information and giving judgment against the said plaintiff.

Now, therefore, if the said plaintiff in said cause shall prosecute its said appeal with diligence and effect and abide by and keep and perform the judgment of the Supreme Court of the Territory of New Mexico, to which said cause has been appealed, in case said judgment of the District Court be affirmed in said Supreme Court, then this obligation to be void, otherwise to remain in full force and effect.

JACOBO J. ARAGON.	[SEAL.]	$100.00
H. LUTZ.	[SEAL.]	$1000.00
LOLA S. NORMAN.	[SEAL.]	$400.00

TERRITORY OF NEW MEXICO,
County of Lincoln, ss:

On this 29th day of March, A. D. 1911, before me the undersigned, a Notary Public, in and for the County of Lincoln and Territory of New Mexico, personally appeared Jacobo J. Aragon, H. Lutz and Lola S. Norman and each acknowledged that he executed the foregoing obligation as his free voluntary act and deed, and the said H. Lutz and Lola S. Norman each being duly sworn by me, upon his oath says that he is worth in property situate in the Territory of New Mexico in value over and above all of his just debts and liabilities and property exempt by law from execution the sum
18 set opposite his signature to said bond.

In Witness Whereof I have hereunto subscribed my hand and affixed my notarial seal this the day and year last above written.

My Commission expires this 7th day of July, 1911.

[SEAL.]

B. J. BACA,
Notary Public.

April 1, 1911. Bond approved as to form.

CHAS. P. DOWNS, *Clerk.*

(Endorsed:) No. 1976. In the District Court for Lincoln County, Territory of New Mexico. Territory of New Mexico by its Attorney General, F. W. Clancy, on the relation of Jacobo J. Aragon, vs. The Board of County Commissioners of Lincoln County, New Mexico. Plaintiff's supersedeas Bond, on appeal to Supreme Court of New Mexico. Filed in my office this 1 day of Apr. 1911. Chas. P. Downs, Clerk Dist. Court. By Herb. R. Wright, Deputy. F. W. Clancy, Attorney General, Santa Fe, N. M. T. B. Catron, Santa Fe, N. M. Geo. B. Barber, Lincoln, N. M. Attorneys for Plaintiff.

United States District Court, Sixth Judicial District of New Mexico.

Office of the Clerk, Lincoln County.

19 No. 1976.

TERRITORY OF NEW NEXICO, by Its Attorney General, F. W. CLANCY, on the Relation of JACOBO J. ARAGON
vs.
THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

Certificate of Comparison.

I, the Undersigned, Clerk of the District Court of the Sixth Judicial District of the Territory of New Mexico, embracing the Counties of Otero, Lincoln, Guadalupe and Quay, do hereby certify that the annexed copy is a true and literal exemplification of the Plaintiff's Supersedeas Bond, on Appeal to Supreme Court of N. M. in the above styled and numbered cause; that I have compared the said annexed copy with the original thereof, now on record in this office, and declare it to be a correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Sixth Judicial District Court of New Mexico, at my office in Alamogordo, said District, this the 7 day of August, A. D. 1911.

[SEAL.]

CHAS. P. DOWNS,
Clerk Sixth Judicial Court of New Mexico.

And afterwards, on to-wit, at the regular term of the Supreme Court of the Territory of New Mexico begun and held at Santa Fe, the seal of Government, on the first Wednesday after the first Monday in January, A. D. 1911, on the 34th day thereof, the same being Friday, the first day of September, the following among other proceedings were had and entered of record, to-wit:

20 No. 1410.

TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON, Appellant,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO, Appellee.

Appeal from District Court, Lincoln County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the

present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Frank W. Parker, Chief Justice Pope, and Associate Justices McFie, Abbott, Mechem and Roberts, Concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered, and adjudged by the court that the judgment of the District Court in and for the County of Lincoln whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, it is considered and adjudged by the court that the Writ of Quo Warranto applied for by the said plaintiff, be not allowed or issued and that the information of the said plaintiff, filed, praying for the writ of Quo Warranto, be, and the same hereby is dismissed, and that the said defendants go hence without day, and that it do have and recover of the said plaintiff its costs in this behalf expended, for which let execution issue.

And afterwards, to-wit, at the said regular term of the Supreme Court of the Territory of New Mexico, on the 34th day thereof, the same being Friday the first day of September, A. D. 1911, the following among other proceedings were had and entered of record, to-wit:

21 No. 1410.

TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON, Appellant,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO, Appellee.

Appeal from District Court, Lincoln County.

This cause coming on before the court upon a motion of Appellant herein for a Statement of Facts by the Court in the nature of a Special Verdict, and to be granted an appeal from the judgment and decree of this Court to the Supreme Court of the United States of America, and the Court being sufficiently advised in the premises, grants the same.

It is therefore ordered and adjudged by the Court that the Appellant herein do have and is hereby granted an appeal from the judgment and Decree of this court to the Supreme Court of the United States.

It is further considered, ordered and adjudged by the Court that the following Statement of Facts be and the same hereby are found and made by this court as a Statement of Facts in this cause in the nature of a special Verdict, to-wit:

The Supreme Court of the Territory of New Mexico, in the foregoing suit, makes the following finding of Facts, in the matter of a special Verdict to be used on appeal in the Supreme Court of the United States:

1. That on July 6th, 1909, a petition was presented to the Board

of County Commissioners of Lincoln County in words and figures as follows:

"County Seat Petition.

To the Honorable Board of County Commissioners of Lincoln County, Territory of New Mexico:

We, the undersigned qualified electors of the County of
22 Lincoln, in the Territory of New Mexico, respectfully petition you to call an election and submit to a vote of the qualified electors of said Lincoln County the proposition to remove the county seat of said Lincoln County to Carrizozo, a town situated on the El Paso and Southwestern Railroad."

Which was the only petition presented to said Board.

2. Said petition was signed by at least one-half of the qualified electors of Lincoln County as shown by the last general election in said county.

3. That at the time said petition was presented to the Board, the Board of County Commissioners of Lincoln County received and accepted a good and sufficient deed to block 8 of the town of Carrizozo, which block contained more than three-fourths acre of land for the site of the court house and jail at Carrizozo.

4. On the 7th day of July, 1909, the Board of County Commissioners of Lincoln County, based on said petition above set out, called an election to be held on the 17th day of August, 1909, which order calling such election was in words and figures as follows:

"A petition having been presented to the Board of County Commissioners which is found to have been signed by qualified electors of Lincoln County, New Mexico, equal in number to at least one-half of the legal votes cast at the last preceding general election in said county, asking for the removal of the county seat of said county to Carrizozo, in said county, and that question of such removal be submitted to a vote of the qualified electors of said county.

And the Board finds that the said town of Carrizozo is more than twenty miles from the present county seat of said county. The Board further funds that the original cost of construction of the
Court House and Jail of said County was less than thirty
23 thousand dollars as shown by the records of the Board of County Commissioners of said county. And a conveyance having been made by the Carrizozo Townsite Company, to this county, conveying block Eight in said town of Carrizozo, said Block Eight containing, as shown by the plat of said town, not less than three-fourths of an acre, which said conveyance is hereby accepted. This Board further finds that said town of Carrizozo is situated upon a line of railroad and that the present county seat of said Lincoln County is situated off the line of railroad.

Now, therefore, in pursuance of the prayer of said petition and in accordance with the facts so found and with the statutes in such case made and provided, it is hereby ordered and directed that an election of the qualified electors of Lincoln County, New Mexico,

be held in each of the precincts of said County on the 17th day of August, 1909, and at said election the tickets to be voted shall contain: " For County Seat ——" with the name of the place for which the voter desires to cast his ballot, either printed or written thereon, such ballots shall be canvassed as en elections for County Officers and the returns of such election shall be certified by the Probate Clerk to the Territorial Secretary together with a certified copy of the order of the County Commissioners and a sworn certificate of the publication thereof, to be filed in the office of the Secretary."

5. That no registration of said electors was ordered to be had or was had prior to said election for said election.

6. That an election was held on the 17th day of August, 1909, under the provisions of said order; that at said election 900 votes were cast for Carrizozo and 613 votes for Lincoln, giving a majority of 287 votes for Carrizozo.

7. That thereafter, and on the 23rd day of August, 1909, the votes cast at said election were canvassed by the Board of County Commissioners and the return certified to the Territorial
24 Secretary. That on the same date the Board of County Commissioners issued an order based upon said election returns changing the county seat from Lincoln to Carrizozo. That said order was published for four consecutive weeks.

8. That, thereafter, the Board of County Commissioners issued and sold twenty-eight thousand dollars of bonds of Lincoln County for the purpose of raising money to construct a new court house and jail at Carrizozo.

9. That after the sale of such bonds the Board of County Commissioners entered into a contract for the construction and erection of such court house and jail, and until the construction thereof was stopped by the injunction in Cause #1980, wherein Jacob J. Aragon was the plaintiff, and the defendants in this case, together with one Ben Betzhel were the defendants, up to which time the construction thereof was proceeding and the Board of County Commissioners were paying out various sums under the provisions of said contract.

10. That the matters and things done and performed by the Board of County Commissioners, as set out in the foregoing findings No. 1 to 9 inclusive, were done and performed by the said Board of County Commissioners in an effort on their part to comply with the provisions of Chapter 80 as printed in the official copy of the Session Laws of the New Mexico Legislature of 1909. That Chapter 80 as printed in the official copy of the Session Laws of the New Mexico Legislative Assembly, 1909, is the original council bill #86 as it passed both houses of the legislature. That said act was introduced in the legislature, in the council thereof, on the 17th day of February, 1909, as a bill entitled an "Act relating to the changing of County Seats," and that said bill on file in the office of the Secretary of the Territory is the original bill introduced into the Legislative Council as above stated. That said bill was never enrolled or engrossed
25 but was used as the original for Chapter 80. That said original of Chapter 80 as printed in the official copy of the Session

Laws of the New Mexico Legislature of 1909, as it appears in the office of the Secretary of the Territory on the 7th day of March, A. D. 1911, did not bear the signature of either the President of the Council or the Speaker of the House of Representatives, nor does it bear the signature of the Governor of the Territory or the approval of the Governor of the Territory but shows thereon that it was filed in the office of the Secretary of New Mexico on the 18th day of March, 1909, at 3 p. m., said date being the date of final adjournment of the Legislature of 1909.

That said bill as filed in the office of the Secretary does not show when the same was received by the Governor, nor does it show that said bill was ever received by the Governor.

Each and every one of which findings of fact were made by the trial court and the same were objected to by the plaintiff and said objection overruled and exception take-.

This court further finds that a duly authenticated copy of the said original Council Bill No. 86, which is the original file of Chapter 80 of the printed statutes of the Legislature of 1905, together with all the endorsements thereon, was introduced in evidence on the trial of said cause, and the Court finds the said certified copy of the same and all of the endorsements thereon to be in the words and figures following, to wit:

Council Bill No. 86.

Introduced by Mr. Navarro.

An act entitled "An Act Relating to the Changing of County Seats."

Be it enacted by the Legislative assembly of the Territory of New Mexico;

SECTION 1. That Chapter 119 of the Session Acts of the legislative assembly for the year 1905, approved March 16, 1905, be, and the same hereby is repealed.

SECTION 2. That Section 630 of the Compiled Laws of the Territory of New Mexico of 1897 be, and the same is, hereby amended so as to read as follows:

"SEC. 630. Whenever the citizens of any county in this Territory shall present a petition to the Board of County Commissioners, signed by qualified electors of said county, equal in number to at least one-half the legal votes cast at the last preceding general election in said county, asking for the removal of the county seat of said county, to some other designated place, which petition shall be duly recorded in the records of said county, said board shall make an order directing that the proposition to remove the county seat to the place named in the petition be submitted to a vote of the qualified electors of said county at the next general election, if the same is to occur within one year of the time of presenting said petition, otherwise at a special election to be called for that purpose at any time within two months from the date of presenting said petition; provided: that whenever it

is proposed to remove a county seat of any county which has public buildings consisting of a court house and jail, the original construction of which cost said county more than the sum of Thirty Thousand Dollars ($30,000) such costs to be ascertained from the records of the Board of County Commissioners of said county, then before said board of commissioners shall make such order, so submitting such proposition to remove the county seat, to the qualified voters of said county, shall require from the petitioners or the persons interested in the removal of said county seat a deposit of forty thousand dollars ($40,000.00) in money, which said deposit shall be placed in the treasury of said county, which said sum of money when so placed in said treasury shall be used in the construc-
27 tion of a court house and jail in the event that the proposition for the removal shall receive a majority of the votes cast at such election, but such deposit shall not be required as a condition precedent to submitting such proposition for the removal in counties which have no court houses and jails, the cost to the county of which, as ascertained from the records of said county commissioners is less than said sum of thirty thousand dollars ($30,000.00) as aforesaid; but the same shall be required in all cases when it is proposed to remove a county seat from a point situated on a railroad to another point also so situated; provided further, that the city, town, village, or place named in the petition to which it is proposed to remove said county seat shall be at least twenty miles distant from the then county seat of said county and said petitioners or persons interested in the removal of said county seat shall cause to be conveyed to said county, by a good and perfect title, in the event that the proposition for the removal shall receive a majority of the votes cast at such election, sufficient suitable land to be accepted, if containing as much as three-fourths of an acre for court house, jail and other buildings for such county, the deed for which shall be filed with and accepted by the Board of County Commissioners before calling said election, which deed to be delivered to the grantor therein named in case said proposition to remove said county seat fails to receive a majority of the votes cast at such election, and that no proposition to remove a county seat from a city, town, village or place, situated on a railroad, to one not so situated, shall be entertained or voted upon, and that no vote shall be ordered on substantially the same proposition more than once in ten years."

SECTION 3. This Act shall be in force and effect from and after its passage and all Acts and parts of Acts in conflict herewith are hereby repealed.

28

Endorsed.

Chap. 80.

38th Legislative Assembly.

Council Bill No. 86.

Introduced by Navarro 17th day of Feb., 1909.

An Act entitled an Act relating to the changing of County Seats.

Read first time, read second time, ordered printed and referred to Committee on Co. & Co. Lines.

Delivered to Translator.....1909
Returned to Translator.....1909
Delivered to Printer, 2/17.....1909
Returned to Printer Feb. 23, 1909.....1909
Delivered to Committee Feb. 23, 1909.....1909

Reported to Council by Committee on the 25th day of Feb. 1909 with recommendation
That it be amended report & amendments adopted and bill
Taken up for consideration, read third time preparatory to its passage, placed on its passage and duly passed.
(Signed) WM. F. BROGAN,
Chief Clerk Council.

3/11 Read

Read third time in preparation to its passage, placed upon its passage & duly passed.
(Signed) E. H. SALAZAR,
Chief Clerk House.

Received from H as duly passed & properly enrolled and engrossed.
(Signed) WM. F. BROGAN,
Chief Clerk Council.

Com. on Finance.

3/3
Read first and second time by title and referred to the Committee on Finance.

Del. to Com. 3/4.

Filed in office of Secretary of New Mexico Mar. 18, 1909, 3 p. m.

NATHAN JAFFA, *Secretary.*

29 TERRITORY OF NEW MEXICO,
Office of the Secretary:

Miscellaneous Certificate.

I, Nathan Jaffa, Secretary of the Territory of New Mexico, do hereby certify that there was filed for record in this office, at 3 o'clock p. m. on the 18th day of March, A. D., 1909, the original Council Bill No. 86 as it passed both Houses of the Legislative Assembly of New Mexico, at a session of 1909; that no engrossed or enrolled copy thereof was or ever has been filed in this office; that the said original bill was used as the original for Chapter No. 80 of the Session Laws of that session, and no other copy was used therefor.

I further certify that I have compared the following annexed copy with the said original on file in my office and declare it to be a correct transcript of the whole of said original chapter 80, as consisting of Council Bill No. 86, and the whole thereof, including all of the endorsements thereon.

Given under my hand and the Great Seal of the Territory of New Mexico, at the City of Santa Fe, at the Capitol, on the 6th day of March, A. D. 1911.

[SEAL.] NATHAN JAFFA,
Secretary of New Mexico.

And afterwards on to wit, on the 26th day of September, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an affidavit of Value, which said affidavit of value in the above entitled cause was and is in the following words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

THE TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCEY, on the Relation of JACOBO J, ARAGON, Appellant,
30 VS.
THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO, Appellee.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

Thomas B. Catron being duly sworn, upon his oath says, th- he is one of the counsel for the plaintiff in the above entitled cause and he is personally acquainted with all of the matters involved in said cause; that the matters involved therein are the uses to be made of the moneys which were received by the defendant upon the sale of $28,000.00 of bonds of the County of Lincoln in said Territory; that contracts have been made for the payment of the $28,000.00 which was realized upon the sale of said bonds for the erection of a court house and jail at Carrizozo, in said County; and that there is still in

the treasury of said county at least $15,000.00 of the said moneys, the validity of the payment of which is involved in the above entitled cause, and that amount of money is involved in the said cause; if the plaintiff succe-ds in the said action those moneys cannot be paid out and the right to pay the same is involved in this action; and therefore the amount in controversy in this action exceeds the sum of five thousand ($5,000) dollars exclusive of interest and costs.

(Signed) T. B. CATRON.

Subscribed and sworn to before me this 23rd day of September, A. D. 1911.

TEMPLE WILLISON,
Notary Public.

My commission expires Oct. 10, 1914.

And afterwards on to wit, on the twenty-sixth day of September, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a Bond in the above entitled cause which said Bond was and is duly in the following words and figures following to wit:

31 Know all men by these presents, That we J. J. Aragon, as principal, and Henry Lutz and Anselmo Pacheco as his sureties, are held and firmly bound unto the Board of County Commissioners of Lincoln County, New Mexico, in the full and just sum of Two Thousand Dollars to be paid to the said Board of County Commissioners of Lincoln County, to which payment well and truly to be made we bind ourselves, our heirs, administrators and executors jointly and severally by these presents. Sealed with out seals and dated this 25th day of September, A. D., 1911.

Whereas, lately in the Supreme Court of the Territory of New Mexico in an action depending in said court between the Territory of New Mexico, by its Attorney General, Frank W. Clancy, on the relation of Jacobo J. Aragon, as appellant, and the Board of County Commissioners of Lincoln County, Territory of New Mexico, as appellees, a judgment was rendered against the said appellant, and the said appellant having obtained an appeal to the Supreme Court of the United States from said Judgment to reverse the same in said action, said appeal having been taken in open court.

Now, the condition of the above obligation is such that if the said appellant shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

JACOBO J. ARAGON. [SEAL.]
HENRY LUTZ. [SEAL.]
ANCELMO PACHECO. [SEAL.]

TERRITORY OF NEW MEXICO,
County of Lincoln:

On this 4th day of September, A. D., 1911, before me the undersigned Notary Public in and for the county of Lincoln, in the

Territory of New Mexico, personally came Jacobo J. Aragon, as principal and Henry Lutz and Anselmo Pacheco as sureties, and each acknowledged before me that he executed the foregoing obligation as his free act and deed, each of them being known to
32 me as the same persons who signed the said obligation, and the said Henry Lutz and Anselmo Pacheco each being duly sworn by me upon his oath says that he is worth in property situate in the Territory of New Mexico over and above his just debts and liabilities and property exempt by law from execution the amount of $2,000.

In witness whereof, I have hereunto subscribed my hand and affixed my notarial seal this the day and year last above written.

My commission expires the 4th day of October 1911.

JOHN W. PENFIELD,
Notary Public.

Approved:

JOHN R. McFIE,
Associate Justice of the Supreme Court of the Territory of New Mex.

And afterwards, on towit, *on* the 26th day of September, A. D., 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors on appeal to the United States Supreme Court, which said Assignment of errors was and is in the *following* words and figures following towit:

In the Supreme Court of the United States of America.

No. —.

THE TERRITORY OF NEW MEXICO, by Its Attorney General, FRANK W. CLANCY, on the Relation of JACOBO J. ARAGON, Appellant,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO, Appellee.

Appeal from Supreme Court of N. M.

Assignment of Errors.

1. The Court erred in not finding that council bill No. 86 had not been legally enacted.

2. In not finding that the alleged election for a change of the county seat had not been legally held.

33 3. In not finding that the alleged chapter 80 of the laws of 1909, even if it has been legally enacted, was either a special or a local law in contravention of the United States Statutes enacted July 30th, 1886, and contained in the first section of Chapter DCCCXVIII of the Statutes at Large, sometimes called the Springer Act, and was therefore null and void.

4. In not finding that there was no evidence that council bill No. 86, which was used in its original shape as the original of Chapter 80 of the Laws of 1909 of the New Mexico Legislature, had ever been signed by the Speaker of the House and President of the Council of the Legislative Assembly of New Mexico, and therefore had not become law.

5. In not finding that council bill No. 86, which was used as the original of Chapter 80 of the laws of 1909, of the New Mexico Legislature, never became a law, it never having been approved by the Governor.

6. In not findind that there was no evidence that said council bill No. 86, which was used as the original of Chapter 80 of the laws of 1909 of the New Mexico Legislature, was presented to the governor three full days before that session of the legislature adjourned, and not being signed or approved by the governor became a law without his signature.

7. The court erred in not finding that there never was any petition signed by a number of qualified voters of Lincoln County, New Mexico, equal to one half of the votes cast at the last preceding general election asking that the county seat of Lincoln County be changed to Carrizozo, and therefore that the said election was illegal and void.

8. The Court erred in not finding that the petition acted upon by the Board of County Commissioners in regard to the said election for a change of the county seat of Lincoln County was not in the terms provided by law nor was it according to the provisions of the law.

9. The Court erred in not finding that the petition which
34 was presented to the Board was not such a petition as the law provided should be made in a case of an application to change a county seat, but was different therefrom; and in addition thereto, was calculated to mislead and deceive the signers thereof.

10. The court erred in not finding that the election in question was void for want of any registration of the names of the legal voters and because said election was held without any registration of the legal voters of said county, as required by law.

11. The Court erred in rendering judgment in favor of the defendants and against the plaintiffs.

12. The court erred in affirming the judgment in favor of the defendants and not rendering judgment in favor of plaintiffs, and in not reversing the judgment of the court below.

13. The Court erred in divers and sundry other respects, as will appear from an inspection of the record and proceedings in said cause.

Wherefore, plaintiffs pray that the judgment and decree of the Supreme Court of New Mexico be reversed in all things, and said cause remanded for proper judgment.

T. B. CATRON, Esq.,
Attorney for Appellants.

And heretofore on to-wit, *on* the first day of September, A. D., 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the Court in the above entitled cause, which said opinion by the court is in words and figures as follows, to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

35 No. 1410.

TERRITORY OF NEW MEXICO, on the Relation of JACOB J. ARAGON, Appellant,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, N. M., Appellee.

PARKER, *J.*:

This is an appeal from a judgment of the District Court of the Sixth Judicial District, sitting in and for the County of Lincoln, dismissing the petition for a writ of quo warranto secured upon the relation of appellant. The case involves no point which has not been heretofore thoroughly considered by this Court in the case of Gray et al. vs. Taylor, et al., 15 N. M. 742, 113 Pac. 588, and the judgment of the lower court upon the authority of that case is affirmed, and it is so ordered.

FRANK W. PARKER,
Associate Justice.

We concur:

WILLIAM H. POPE, *C. J.*
JOHN R. McFIE, *A. J.*
IRA A. ABBOTT, *A. J.*
MERRITT C. MECHEM, *A. J.*
CLARENCE J. ROBERTS, *A. J.*

Wright, A. J. having heard the case below did not participate in this decision.

36 TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the foregoing thirty-five pages contain a full, true and perfect copy of the record and proceedings, pleadings and opinion filed in the above entitled cause which is transmitted to the Supreme Court of the United States, in accordance with an appeal heretofore granted by this Court herein.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico this the 20th day of September, A. D. 1911.

[Seal Supreme Court, Territory of New Mexico.]

JOSE D. SENA,
Clerk Supreme Court, Territory of New Mexico.

Endorsed on cover: File No. 22,965. Territory of New Mexico Supreme Court. Term No. 889. The Territory of New Mexico, by its attorney general, Frank W. Clancy, on the relation of Jacobo J. Aragon, appellant, vs. The Board of County Commissioners of Lincoln County, New Mexico. Filed December 14th, 1911. File No. 22,965.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1912.

S. T. GRAY AND ROBERT BRADY
vs.
ROBERT H. TAYLOR, ET AL

No. 653.

TERRITORY OF NEW MEXICO, BY ITS ATTORNEY-GENERAL, EX REL
vs.
THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

No. 483.

BRIEF OF PLAINTIFF.

T. B. CATRON,
GEO. B. BARBER,
Attorneys for Plaintiff.

ALBRIGHT & ANDERSON, PRINTERS, ALBUQUERQUE, N. M.

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

October Term, 1912.

S. T. GRAY AND ROBERT BRADY
vs. No. 653.
ROBERT H. TAYLOR, ET AL

TERRITORY OF NEW MEXICO, BY ITS ATTORNEY-GENERAL, EX REL
vs. No. 889
THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

The two above entitles causes involving exactly the same questions and facts are agreed to be submitted together on briefs for decision of this court.

Cause No. 653 is an equitable action brought by plaintiffs as tax payers of Lincoln County, New Mexico, to restrain and enjoin the erection of a court house and jail at Carrizozo in that county and to enjoin the paying out and the expenditure of twenty-eight thousand dollars of money in the treasury of the county, proceeds of bonds issued and sold by the Board of County Commissioners, ostensibly for the purpose of erecting a court house and jail at Carrizozo in said county, the county seat of said county, prior thereto, having

been at the town of Lincoln. The action of the said Board of County Commissioners was pretended to be based upon Section 2, Chapter 80, as printed in the laws of 1909, which chapter was initiated in the legislature of 1909 by Council Bill No. 86. That chapter, omiting Sections 1 and 3, which have no bearing on the question, is in the following words:

CHAPTER 80.

An Act entitled "An Act Relating to the Changing of County Seats." C. B. No. 86; Law by Limitation, March 18, 1909.

CONTENTS.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

Sec. 1. * * * * * * * * * *

Sec. 2. That Section 630 of the Compiled Laws of the Territory of New Mexico of 1897 be, and the same is, hereby amended so as to read as follows:

"Sec. 630. Whenever the citizens of any county in this Territory shall present a petition to the board of county commissioners signed by qualified electors of said county, equal in number to at least one-half the legal votes cast at the last preceding general election in said county, asking for the removal of the county seat of said county, to some other designated place, which petition shall be duly recorded in the records of said county, said board shall make an order directing that the proposition to remove the county seat to the place named in the petition, be submitted to a vote of the qualified electors of said county at the next

general election, if the same is to occur within one year of the time of presenting said petition, otherwise at a special election to be called for that purpose at any time within two months from the date of presenting said petition: Provided, That whenever it is proposed to remove a county seat of any county which has public buildings consisting of a court house and jail, the original construction of which cost said county more than the sum of thirty thousand dollars ($30,000) such cost to be ascertained from the records of the board of county commissioners of said county, then before said board of commissioners shall make such order so submitting such proposition to remove the county seat, to the qualified voters of said county, shall require from the petitioners or the persons interested in the removal of said county seat a deposit of forty thousand dollars ($40,000) in money, which said deposit shall be placed in the treasury of said county, which said sum of money when so placed in said treasury shall be used in the construction of a court house and jail in the event that the proposition for the removal shall receive a majority of the votes cast at such election, but such deposit shall not be required as a condition precedent to submitting such proposition for the removal in counties which have no court houses and jails the cost to the county of which, as ascertained from the records of said county commissioners is less than said sum of thirty thousand dollars ($30,000) as aforesaid; but the same shall be required in all cases when it is proposed to remove a county seat from a point situated on a

railroad to another point also situated: Provided, further, That the city, town, village or place named in the petition to which it is proposed to remove said county seat shall be at least twenty miles distant from the then county seat of said county and said petitioners or persons interested in the removal of said county seat shall cause to be conveyed to said county, by a good and perfect title, in the event that the proposition for the removal shall receive a majority of the votes cast at such election, sufficient suitable land to be accepted, if containing as much as three-fourths of an acre for court house, jail and other buildings for such county, the deed for which shall be filed with and accepted by the board of county commissioners before calling said election which deed to be re-delivered to the grantor therein named in case said proposition to remove said county seat fails to receive a majority of the votes cast at such election, and that no proposition to remove a county seat from a city, town, village, or place, situated on a railroad, to one not so situated, shall be entertained or voted upon, and that no vote shall be ordered on substantially the same proposition more than once in ten years."

Sec. 3. * * * * * * * * * * *

The plaintiff alleges:

1. That said Chapter 80 of the printed laws of 1909, which was Council Bill No. 86, never legally enacted (T. R. p. 4) and the answer does not deny or make any defense to said allegation.

2. That Council Bill No. 86, which is printed as Chapter 80, Laws of 1909, was never signed by

the President of the Council, nor by the Speaker of the House of Representatives in its supposed passage in the House and Council of the legislature, as required by the rules of both houses before it was presented to the Governor for his approval. (T. R. p. 4.)

3. That the election pretended to have been held on the 17th day of August, 1909, under said alleged Chapter 80, in reference to a change in the county seat of the County of Lincoln, to Carrizozo, was never lawfully held. (T. R. p. 7.) The answer does not deny this allegation nor make any defense to it.

4. That no legal petition as required by said alleged Chapter 80, was ever presented to the Board of County Commissioners as a preliminary to the holding of said election. (T. R. p. 6, also p. 7.) The answer does not deny this or make any other defense thereto.

5. That the said pretended election for changing the county seat was in violation of law, no legal petition therefor having been presented to the said Board of County Commissioners of Lincoln County. This allegation was not denied or otherwise answered.

6. That the county seat of Lincoln County has never been lawfully located or established at Carrizozo. (T. R. p. 9.) This allegation is not denied or otherwise answered.

7. That the expenditure of the money of the county in the erection of a court house and jail at Carrizozo would be illegal and invalid and a total loss to the county. (T. R. p. 9.) This alle-

gation is not denied or any defense whatever made to the same.

8. That a quorum of said Board of County Commissioners on the 9th day of July, 1909, at a meeting of said Board, illegally and wrongfully made an order calling for an election to vote on the proposition to remove the county seat of Lincoln County, to be held on the 17th day of August, 1909. (T. R. p. 3.) This allegation is not denied or otherwise answered.

9. That said election so ordered, was held on said day without any registration of the voters of the County of Lincoln therefor. (T. R. p. 7.) This allegation was not denied or other defense made to the same. Section 1709 Comp. L., New Mexico, provides "Sixty days before any election in this territory, except according as provided in section one thousand seven hundred and twelve, it shall be the duty of the county commissioners in their respective counties, to appoint three capable persons as a board of registration for each precinct in their respective counties, at least one of whom shall belong to a different political party from that of the majority of the said board of county commissioners." And Section 1710 also provides, "It shall be the duty of the board of registration to make out in their respective precincts, the lists of the legal voters, and these shall not be required to be present to be registered."

10. Testimony was taken in the said cause and the judgment of the court, as rendered, was, as follows: "This cause coming on to be heard for final hearing on the 6th day of June, A. D. 1910,

and the court, after having heard the testimony in this cause and arguments of counsel and being fully advised in the premises, it is, by the court, ordered, adjudged and decreed that the injunction issued in this cause be, and the same is hereby, dissolved and plaintiffs' complaint herein be dismissed at their cost." From which judgment plaintiffs appealed to the Supreme Court of the Territory of New Mexico, which court on hearing of the said cause for reasons stated in the opinion of the court, rendered a judgment and decree affirming the judgment of the court below and dissolving the injunction and dismissing the complaint. (T. R. p. 26.) For reasons stated in the opinion of the court (T. R. p. 40 et sec) Two justices of the court held that there was no sufficient petition presented to the Board of County Commissioners to require them to order said election and only two judges held that the petition was sufficient. The opinion being affirmed on that ground on an equal division of the court, but the decision was affirmed by all of the court on the ground that the court had no jurisdiction to entertain the cause except by proceedings of quo warranto, which was the reason why the action embraced in the transcript No. 889 was commenced (T. R. p. 45 for the dissenting opinion of Chief Justice Pope and Associate Justice Wright).

11. Complaint substantially alleged that Chapter 80 under Council Bill 86, was in violation of the statute of the United States, enacted March 3rd, 1886, which provides "that the legislatures

of the territories of the United States now or hereby to be organized, shall not pass any local or special laws in any of the following enumerated cases, that is to say * * * locating or changing county seats * * * "

12. Appellants have filed the following assignment of errors:

ASSIGNMENT OF ERRORS.

1. The Court erred in not finding that Council Bill No. 86 had not been lawfully enacted.

2. In not finding that the alleged election had been legally held.

3. In not finding that the alleged Chapter 80 of the laws of 1909 was either special or local in contravention of the Springer Act, and null and void.

4. In not finding that there was no evidence that the enrolled Council Bill No. 86, claimed to be Chapter 80 of the laws of 1909, had not been signed by the Speaker of the House and the President of the Council, and therefore had not become a law.

5. In not finding that Council Bill No. 86 never became a law, because it was never approved by the Governor.

5½. The court erred in not finding that there is no evidence that Council Bill No. 86 was presented to the Governor three full days before the session adjourned so as to make it become a law under the Governor's signature.

6. The court erred in not finding that there never was any petition signed by a number of qualified voters of Lincoln County equal to one-

half of the votes cast at the last preceding general election asking that the county seat of Lincoln County be changed to Carrizozo, and that therefore the said election was illegal.

7. The court erred in not finding that the petition acted on by the Board of County Commissioners in regard to the election, was not according to law, nor as provided by law.

7½. The court erred in not finding that the petition which was presented to the Board was not such a petition as the law provided should be made, but was different therefrom, and was one calculated to deceive and mislead the signers thereof.

8. The court erred in not finding that the ballots which were directed to be voted were calculated to deceive and mislead the voters and cause them to vote in favor of Carrizozo instead of against it.

9. The court erred in not finding that the ballot which was required by law and by order of the County Board to be voted was void for want of definiteness and clearness to the voters sufficiently to apprise them of their rights and how they should vote.

10. The court erred in not finding that the ballot, which was required to be voted was one calculated to induce votes to favor Carrizozo rather than oppose it, and that under it a voter could not understand his right or the effect of his vote if he wished to vote against the proposition.

11. The court erred in not finding that fraud was practiced in securing signatures to the peti-

tion to such an extent as to infect and render vicious and illegal the whole petition and make it void.

12. The court erred in not finding that there was such an amount of illegal votes cast at such election as to taint the whole election with fraud and render it void.

13. The court erred in not finding that the election was void for want of any registration of the names of the legal voters and because the same was held without any registration, as registration was required by law for all elections.

14. The court erred in not finding that the County of Lincoln had, at the time said alleged election was held, a court house and jail, the original construction of which cost more than $30,000.00 as shown by the record of the Board of County Commissioners.

15. The court erred in not finding that said election was void because the sum of $40,000.00 was not deposited, as required by law, to be used in the construction of a court house and jail at Carrizozo if a majority of the qualified voters were in favor of that place in said election.

16. The court erred in rendering a judgment in favor of defendants and against the plaintiffs.

17. The court erred in dismissing the complaint and in not rendering judgment in favor of plaintiffs in accordance with the prayer of their complaint.

18. The court erred in divers and sundry other respects as will appear from an inspection of the record and proceedings in said cause.

The Supreme Court made a finding of facts in this cause No. 653, which is included in the transcript from page 33 to 38 both inclusive.

CASE 889.

Said cause brought by the Territory of New Mexico by its Attorney-General on the relation of Jacobo J. Aragon, against the Board of County Commissioners of Lincoln County, is an action praying for a writ of quo warranto against the said Board of County Commissioners and was brought by reason of the decision rendered by the Supreme Court of New Mexico in cause No. 653 above referred to. The opinion in that cause alleges that the respondent without any lawful warrant, grant or authority has and does use the liberties, privileges and franchises

1. Of changing and establishing the county seat of Lincoln County, from Lincoln to Carrizozo.

2. Of erecting and constructing buildings for a court house and jail at Carrizozo.

3. Of holding sessions of the Board of County Commissioners at Carrizozo, claiming the same to be the county seat of Lincoln County and that Lincoln is not the county seat; the county seat of said Lincoln County having been established at Lincoln ever since the organization of said county.

4. Of preparing buildings and places at Carrizozo for the removal of the public offices of said county thereto and in which to keep and deposit all the records of said county.

5. And is now erecting buildings for a court house and jail at Carrizozo to be used ostensibly as a court house and jail for said county for hold-

ing sessions of the district court, probate court and Board of County Commissioners of said county and for that purpose is paying out large sums of money to contractors from the public funds of the county.

6. Using private buildings and accommodations for holding the district court for said county at Carrizozo and continuing to do so.

7. Is recognizing Carrizozo as the county seat of said county and has decreed and declared the county seat of said county has been changed by virtue of an alleged election, pretended to have been held under an order, from Lincoln to Carrizozo.

8. Such change is pretended to have been made by virtue of the provisions of an alleged or pretended act of the legislature contained in Chapter 80 of the printed laws of 1909, which said printed act was never lawfully enacted and is in violation of the United States statutes.

9. Said election was legally authorized, ordered or called by virtue of a petition of said Board to call an election to submit to the vote of the qualified electors of said County of Lincoln on the proposition to remove the county seat of said county to some other designated place, or Carrizozo, no petition having ever been presented to said Board for the removal of the said county seat of said county to said Carrizozo as required by law.

10. Said election was void because there was no registration of the voters had for the same. (T. R. pages 1, 2 and 3.)

The defendant demurred to that information (T. R. 4), which said demurrer was overruled by the court (T. R. 4). The defendant then answered the complaint (see pp. 5, 6 and 7) and in the 7th paragraph of its said answer (T. R. p. 3) "it alleges that on July 6th, 1909, at a regular session of said Board, a petition was presented to it signed by qualified voters of said county in number largely in excess of one-half of the legal votes cast at the last preceding general election held in the county, asking for the removal of the county seat, which was filed therewith, marked Exhibit "A" and which petition was duly recorded in said county. That Carrizozo is more than twenty miles from Lincoln and on a line of railroad while Lincoln is not so situated." Said Exhibit "A" is in the following words: "To the Honorable Board of County Commissioners of Lincoln County, Territory of New Mexico: We, the undersigned qualified electors of the County of Lincoln, in the Territory of New Mexico, respectfully petition you to call an election and submit to a vote of the qualified electors of said Lincoln County, the proposition to remove the county seat of said Lincoln County to Carrizozo, a town situated on the El Paso and Southwestern railroad."

The information alleges that the election was legally authorized, ordered or called by virtue of petition to said Board to call an election to submit to a vote of the qualified electors of said County of Lincoln, the proposition to remove the county seat of said Lincoln County to Carrizozo, a town situated on the El Paso and Southwestern

railroad and not by virtue or in accordance with any petition of said Board asking for the removal of the county seat of said county to some other designated place (T. R. p. 2), and the court finds (T. R. p. 15) that the petition, which is set out in full above "was the only petition presented to said Board" consequently there was no petition asking for the removal of the county seat of said county to some other designated place as required by the said alleged Chapter 80. The court affirmed the judgment of the lower court for reasons stated in the opinion of the court on file. (T. R. p. 24.) From which said judgment an appeal was taken to this court and the following assignment of errors was filed (T. R. pages 22 and 23):

ASSIGNMENT OF ERRORS.

1. The court erred in not finding that Council Bill No. 86 had not been legall enacted.

2. In not finding that the alleged election for a change of the county seat had not been legally held.

3. In not finding that the alleged Chapter 80 of 1909, even if it has been legally enacted, was either a special or a local law in contravention of the United States statutes enacted July 30th, 1886, and contained in the first section of Chapter DCCCXVIII of the Statutes at Large, sometimes called the Springer Act and therefore null and void.

4. In not finding that there was no evidence that Council Bill No. 86, which was used in its original shape as the original of Chapter 80 of the

Laws of 1909 of the New Mexico legislature, had ever been signed by the Speaker of the House and President of the Council of the Legislative Assembly of New Mexico, and therefore had not become law.

5. In not finding that Council Bill No. 86, which was used as the original of Chapter 80 of the Laws of 1909, of the New Mexico legislature, never became a law, it never having been approved by the Governor.

6. In not finding that there was no evidence that said Council Bill No. 86, which was used as the original of Chapter 80 of the Laws of 1909 of the New Mexico legislature, was presented to the Governor three full days before that session of the legislature adjourned, and not being signed or approved by the Governor became a law without his signature.

7. The court erred in not finding that there never was any petition signed by a number of qualified voters of Lincoln County, New Mexico, equal to one-half of the votes cast at the last preceding general election asking that the county seat of Lincoln county be changed to Carrizozo, and therefore that the said election was illegal and void.

8. The court erred in not finding that the petition acted upon by the Board of County Commissioners in regard to the said election for a change of the county seat of Lincoln County was not in the terms provided by law nor was it according to the provisions of the law.

9. The court erred in not finding that the pe-

tition which was presented to the Board was not such a petition as the law provided should be made in case of an application to change a county seat, but was different therefrom; and in addition thereto, was calculated to mislead and deceive the siguers thereof.

10. The court erred in not finding that the election in question was void for want of registration of the names of the legal voters and because said election was held without any registration of the legal voters of said county, as required by law.

11. The court erred in affirming the judgment in favor of the defendants and not rendering judgment in favor of plaintiffs, and in not reversing the judgment of the court below.

12. The court erred in rendering judgment in favor of the defendants and against the plaintiffs.

13. The court erred in divers and sundry other respects, as will appear from an inspection of the record and proceedings in said cause.

Wherefore, plaintiffs pray that judgment and decree of the Supreme Court of New Mexico be reversed in all things and said cause remanded for proper judgment.

The Supreme Court made finding of facts in this cause No. 889, which is included in the trancript from page 14 to 20 both inclusive.

POINTS AND AUTHORITIES.

I.

CHAPTER 80 OF THE LAWS OF 1909, RELIED ON AS THE BASIS OF THE RIGHT TO CHANGE THE COUNTY SEAT IN QUESTION, IS BOTH A LOCAL LAW, AND ALSO A SPECIAL LAW, AND IF OTHERWISE LEGALLY ENACTED IS IN VIOLATION OF THE ACT OF CONGRESS, APPROVED JULY 30TH, 1886, COMMONLY CALLED THE SPRINGER ACT, AND IS THEREFORE ILLEGAL AND VOID AND CONFERRED NO RIGHT TO CHANGE A COUNTY SEAT IN NEW MEXICO.

The Springer Act provides: "That the Legislatures of the Territories of the United States now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases; that is to say: * * * * locating and changing county seats. * * * * regulating county and township affairs; * * * * granting to any corporation, association or individual any special of exclusive privilege, immunity or franchise whatever. * * * * In all other cases where a general law can be made applicable so special law shall be enacted in any of the Territories of the United States by the Territorial Legislature."

The second section of the alleged Chapter 80, Laws of 1909, provides: "That the city, town village or place named in the petition to which it is proposed to remove said county seat shall be at least twenty miles distant from the then county seat of said county. * * * *and that no proposi-

tion to remove a county seat from a city, town, village or place situated on a railroad to one not so situated shall be entertained or voted upon."

The town of Lincoln, where the county seat has been, is not on a railroad. The town of Carrizozo, the place where they propose to take the county seat, is on a railroad. Of this the Court will take judicial notice. The provisions of Chapter 80 above quoted, exclude in all counties, all towns, cities, villages and places within a radius of twenty miles of any county seat from the privilege or right to have the county seat moved to it. Under that provision no place within twenty miles of Lincoln could have that benefit. The act does not, therefore, act uniformly upon all parts of that county or any other county, nor upon all the people of the county, alike. It is limited and restricted in its operation to cities, towns, villages and people more than twenty miles beyond the county seat.

The Springer Act of Congress forbids a local or special law locating or changing county seats. This alleged law, Chap. 80, does not apply to more than one-half of the State of New Mexico. The territory for a radius of twenty miles around each county seat is excluded from participating in the right to have for itself the county seat; it can only unite in attempting to retain the county seat at the old place or to change it to the new one proposed. The town of Capitan in Lincoln County, lies on the railroad, about twelve or fourteen miles from Lincoln and about eighteen miles from Carrizozo, on a straight line. Under that alleged

act the town of Capitan would have no right to present a petition for the change of the county seat from Lincoln to its place, nor from the town of Carrizozo. Before Capitan could get the county seat it would have to be changed from Carrizozo or Lincoln to some other place twenty miles distant from Capitan on the railroad, if located at Carrizozo or if at Lincoln some other place in the county twenty miles distant from Capitan, but that would take twenty years to accomplish, that is, ten years after the change to Carrizozo to some other place in the county more than twenty miles distant from Capitan and then ten years after that change to get it back to Capitan.

The last clause of Section 2 of the alleged Chapter 80 says: "that no proposition to remove a county seat from a city, town, village or place, situated on a railroad, to one not so situated, shall be entertained or voted upon, and that no vote shall be ordered on substantially the same proposition more than once in ten years."

If a new town on the railroad within nineteen miles of Carrizozo should build up and have a population of fifty thousand people, and Carrizozo should go down to a prairie dog town with no people, the county seat could not be changed to this new town without first changing it to some town more than twenty miles from it, and waiting ten years more for a new election.

The provisions quoted from Chapter 80, especially the first portion of it, make the act in question if valid at all for any purpose, or if properly enacted for any purpose, a local and special

act and void under the Springer Act. The authorities are quite numerous as to what constitutes a local and special act; sometimes they are designated as private acts:

People vs. Supervisors, 43 N. Y. 16;
Matter vs. Henneberger, 155 N. Y. 424-427;
People vs. O'Brien, 38 N. Y., 193;
Ferguson vs. Ross, 126 N. Y., 464;
Closson vs. Trenton, 48 N. Y., 439;
Com. vs. Patten, 88 Pa. St. 260;
Davis vs. Clark, 106 Pa. St. 360;
McCarthy vs. Com. 110 Pa. St. 246 et seq.
Montgomery vs. Co., 91 Pa. St. 125;
Devine vs. Commissioners, 84 Ill., 591, et seq.;
State vs. Herrman, 75 Mo. 346;
Scowdens App. 96 Pa. St. 424-5;
Klokke vs. Dodge, 103 Ill., 125;
State vs. Mitchell, 21 Ohio St. 592;
State vs. Judges, 21 Ohio St. 11;
Strange vs. Dubuque, 62 Iowa, 205;
South. on Stat. Const. Secs. 127, 128, 129, and cases cited;
Smith's Com. Secs. 595 and 596;
Sedg. Const. Law, 32;
Potters Dwarris on Stats. 355;
Ex-Parte Westerfield, 55 Calif. 552;
Desmond vs. Dunn, 55 Calif. 251.

In the case of Ex-parte Westerfield, 55 Calif. 552, the courts say: "A general law must include within its sanction all who come within its limit and scope. It must be as broad as its object. * * * * the prohibitory law must be made appli-

cable to all of a class, * * * To say that every law is general within the meaning of the constitution which bears equally upon all to whom it is applicable is to say there can be no special law."

Sedg. on Stat. Cons. Sec. 127, says: "Special laws are those made for individual cases or for less than a class requiring laws appropriate to its peculiar condition and circumstances; *local laws are special as to place.* When prohibited they are severally objectionable for not extending to the whole subject to which their provisions would be equally applicable, and thus permitting a *diversity* of laws relating to the same subject. The object of the prohibition of special or local laws *is to prevent this diversity.* Each subject as to which such laws are prohibited is by such inhibition designated as a subject of only general legislation; *it shall have a uniform operation.* Generality in scope and uniformity of operation are both essential. A law which embraces a whole subject would be special if not framed to have a uniform operation."

How can it be said that the law in question, providing for the change of county seats, is uniform in its operation, or that there is any *diversity* in its operation? Who dare say that the conditions as to cities, towns and villages and places twenty miles distant from a county seat are different from those within twenty miles from a county seat?

In Van Riper vs. Parsons, 40 N. J. L. 123, that court declared this principle: "That a general law as contradistinguished from one special or

local is a law which embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class."

And also, on a second consideration of that case, the court declared: "A law framed in general terms restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purposes of the legislature, or distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law without regard to the consideration that within this state there happens to be but one individual of that class one place where it produces effects."

In what manner can it be claimed that any part or rather all the parts of any county in this state lying more than twenty miles beyond the county seat are distinguished from the parts lying within twenty miles of the county seat by characteristics sufficiently marked and important to make them a class by themselves? It has never been held that a county might be divided up by lines generally designated and each division so made be a class by itself having different characteristics and differently marked from each other. If such could be the case, an act might be passed providing that a county seat in each county might be changed to that particular tract of land which was not embraced in any of the townships mentioning them all by name except one. And then it might be limited further to a particular section or a quarter section in that remaining township by prohibiting it from being placed in any other part. This

act certainly prohibits the county seat from being located anywhere within a radius of twenty miles of the county seat, or within a circle forty miles in diameter having the county seat in the center embracing an area of about 33,000 square miles or more than one-half of the public land of the State after taking out Indian and Forest Reservations, or more than one-half of the whole state, there being twenty-six counties and only 78,000 square miles in the state.

In the County of Lincoln the town of Capitan is situated on a railroad, within about twelve miles of the town of Lincoln and about eighteen miles from Carrizozo on a straight line. Can there be any characteristics about the town of Carrizozo which would distinguish it or classify it rather different from the town of Capitan, or from the town of San Patricio in that county about ten miles from the town of Lincoln, on a straight line. How can it be said that any place outside of twenty miles from the town of Lincoln has different characteristics or is any way differently marked, so far as the public interest is concerned, from any place within twenty miles? It never was intended to classify a country by lines drawn through it and make different localities between the lines different classes. It is permitted to make classifications according to population of cities, towns and villages compared one with the other, but not according to their location at a given distance from a point or line.

In Zeigler vs. Gadis, 44 N. J. L., 363, it is said in the syllabus: "The latter law, giving the

courts of common pleas the power to grant such licenses, being restricted to cities, towns and counties by populations which indicate but three small towns in one county, without any apparent distinction which will, in any reasonable degree, account for such restricting, is unconstitutional, being a private, local or special law, regulating the internal affairs of towns and counties."

This is a case where even the matter of population did not make it general, because there was no apparent distinction which would in a reasonable degree account for the restriction. Under our law in this state, where is the distinction which in any reasonable degree can account for the restriction that the county seat when changed should be more than twenty miles from the old one? Why should it be more than twenty miles? What was there, or what is there, as a distinguishing mark or characteristic in cities, towns and villages twenty miles away which will generally distinguish them as a class from those within twenty miles, except the mere matter of distance? Suppose a county was only thirty miles square and the county seat was situate in the center, it would not be possible to change the county seat except probably into one of the extreme corners, or if the county was only twenty miles square, not even to a corner.

In Hammer vs. State, 44 N. J. L. 669, the court say: "Nor can any departure from the rule be justified except where by reason of the existence of a substantial difference between municipalities a general law would be inappropriate to some,

while it would be appropriate and desirable for others. There it would be warranted not only by the necessities of the situation but by a reasonable construction of the constitutional provision. In such a case the municipalities in which the peculiarity exists would constitute a class and the legislation would in fact be general, because it would apply to all to which it would be appropriate. But distinctions which do not arise from substantial differences, differences *so marked* as to call for separate legislation, constitute no ground for supporting such legislation."

Where are the substantial differences in this state so as to classify the towns lying twenty miles from a county seat from those lying within twenty miles of it? What are the substantial differences between those towns? They must certainly be such as the court will take judicial notice thereof. They must not be classified by an imaginary line, but by some circumstance or condition directly affecting them, the one from the other.

The case of People vs. Supervisors, 43 N. Y. 16, is a very instructive case in regard to what is meant by local and special laws. Speaking of the word local as applied to law, the court say:

"By ascertaining what meaning has been given to this word by writers and courts when applied to a statute. Perhaps it is not easy to give a general rule or definition of it, which will be so exact in its scope and limit as accurately to include every proper case, and to exclude all others. And this may be the reason it has been but seldom attempted in the decisions. Elemental writers

aid us somewhat. Bouvier (Law Dict., voce local) defines local, fixedness in a place; "local taxes or those which are collected for particular districts." At the word statute, he makes no mention in his division of statutes of those which are local, but defines private acts as those relating to any particular place, or to several particular places, or to one or several particular counties. In his view, local and private would seem to be convertible terms. So Kent (Comm., vol. 1, p. 415) makes no division of statutes, save into public and private, and defines the latter as such as concern the particular interest or benefit of certain individuals or particular classes of men operating upon a particular thing or private persons; and says, also, "the most comprehensive if not the most precise definition in the English books is, that public acts relate to the kingdom at large." Bouvier (Institutes, vol. 3, p. 95) defines the local courts of the United States as those having jurisdiction over a limited territory only: some larger, some smaller. Jacobs (Law Dict voce Statute) classes acts as general or special, public or private; and defines special and private acts in nearly the words used by Kent. He says that they are classed in three series: 1. Public general acts. 2. Local and personal acts to be judicially noticed. 3. Local and personal acts not printed. And in the second series, he classes road acts and others of an extensive nature made public acts by a clause in them requiring that judicial notice be taken of them. Dwarris on Statutes, vol. 2, p. 463, makes the same division as

Jacobs, and adds: "Acts relating to any particular place, or to divers particular towns, or to one, or to divers particular counties, are private acts." "A statute," he says, "which concerns the public revenue is a public act; but some clauses therein may, if they relate to private persons only, be private." And in volume 1, at page 354, he says: "Every bill for the particular benefit of a person or company, or a locality in which the whole comumnity is not interested, is, in a parliamentary sense, a private bill."

The case above quoted from is a very interesting and instructive case and compiles many of the authorities bearing on this proposition.

On page 18, the court say: "We judge that they employed the word private, as applicable to persons only; and the word local, as applicable to territory only; but both, as words signifying a narrowing or restricting of purpose. Hence, authoritative definitions of the word private, as applied to a law, throw light upon the meaning of the word local, as so applied."

In Ferguson vs. Ross, 126 N. Y., 464, the court say: "A statute may be public and still local, and, therefore, within the purview of the constitution * * *. The fact that an act operates only upon a limited area or upon persons within a specified locality and not generally throughout the state, is, in most cases, a reasonably accurate test by which to determine whether the act is general or local."

Does not that exactly fit this case? The proposed section of the alleged Chapter 80 was intended to operate upon a limited area or on per-

sons within a specified locality, that is, such as were twenty miles beyond the county seat, and not generally throughout the county.

In Matter vs. Henneberger, 155 N. Y. 425, the court say: "That the present act is expressed in general terms is not and should not be decisive of the question of its constitutionality. That is a question which must be decided not by the letter, but by the spirit, of the act."

What is the spirit of the New Mexico Act? It is plain that that amendment was prepared for a specific purpose; it was intended to enable the people in Lincoln County, we will say, or at least a part of them, to change that county seat to Carrizozo; and its purpose was to exclude from competition with Carrizozo or some other town in some other county all cities, towns or villages lying with twenty miles of the county seat. It intended to destroy competition and limit the number of towns of similar character and situation to which the county seat might be changed and exclude all those within twenty miles of the county seat from competing. It did not provide that it should be changed to a place on a railroad, unless the county seat was first located on a railroad. It made no distinguishing mark or characteristic of any city, town or village as being situated on a railroad to which a county seat might be changed from a place not situated on a railroad. Why was it that in changing a county seat it should be changed to a place not less than twenty miles distant? Is there any particular connection between the act or the objects of the

act and the fact that the county seat must be carried twenty miles? Is there anything which appears in the atmosphere of this act that the country around the old county seat was impregnated with some condition of things that rendered it necessary for the general welfare that the county seat should be carried beyond the twenty mile limit? The authorities say that there must be a reasonable ground for the making of the law. Could it be said that the same reason would be applicable to every place in every direction from the old county seat, a distance of twenty miles away, and not be applicable to any place within twenty miles of the old county seat? Did distance make the distinction or create the classification and show an object? If so, how? The object was apparent; it was to destroy the greatest amount of competion for the county seat by legalizing it and excluding those places which might be better fitted for it.

In Van Giessen vs. Bloomfield, 47 N. J. L. 442, it is held, quoting from the syllabus: "The act of 1879, p. 337, is special and local and is therefore unconstitutional so far as it relates to townships. The distinction necessary to mark a class for legislation must be something in the situation or circumstances of the places embraced by the legislative enactment, which would render the powers, if granted, inappropriate to and unavoidable for other like political districts."

What is there in our case that renders localities twenty miles beyond the county seat fitted to take the county seat and which facts are inappropriate

to or unavailable to other places within twenty miles of the county seat? Nothing is pointed out in the act, except the distance between them, and the mere fact that one place is twenty-one miles away from the county seat and the other only nineteen miles, while all the other conditions and circumstances and characteristics pertaining to them are alike, certainly could not be held to be a classification of the kind that would justify general act, and not be held to be local or special.

In Closson vs. Trenton, 48 N. J. L. 440, the act provided that cities containing more than 15,000 inhabitants, and which had a board of excise commissioners, wherein licenses were not granted by the Court of Common Pleas, the Board would be authorized to establish a license and excise the department. That, the court hold, would leave four cities in that condition, the intention being to take the licensing power from the common council where it had previously existed. The court say: "Inasmuch as the granting of licenses is a matter which appertains to all cities, any legislation which deals with the method of granting licenses must apply to all cities or reduce all cities to a uniform system." There is no pretense that in the county of Lincoln or any other county in the Territory the conditions and circumstances and characteristics applicable in each county is uniform as to every locality in the county, except that some of them may be on a railroad; but to get the county seat away from Lincoln there is not even a classification made which would necessarily carry it to the railroad, even if that would classify

it, which it will not.

In Davis vs. Clark, 106 Pa. St. 384, there was an act of the legislature providing that certain laborers and mechanics should have a lien upon engines, engine house, derrick, tank, building, machinery, wood or iron improvements, oil wells and fixtures, and upon the lot or leasehold ground for the price and value of the labor and work, provided that such lien should extend, etc. And it was further provided that the provisions of the act should not apply to counties having a population over two hundred thousand inhabitants. Suit was brought to foreclose a lien under that act, and the question was raised that the lien was void because the act was in contravention of the constitution of the state which prohibited local and special laws authorizing the creation, extension or impairing of liens. The court say: "It shows on its face that it was not intended to apply and does not apply to the whole state. It assumes what was a well known fact that some of the counties had each a population greater than two hundred thousand (200,000) * * *.

"It was not then a general act applicable to every part of the commonwealth. It did not apply to a great number of counties; but there is no dividing line between a local and a general statute. It must be either the one or the other. If it applied to the whole state it is general; *if to a part only, it is local.* As a legal principle it is as effectually local when it applies to sixty-five counties out of sixty-seven as if it applied to one county only. The exclusion of a single county

from the operation of the act makes it local."

In that case sixty-five counties were included in the purview of the act and only two excluded, and those two were excluded on the theory or classification idea that they possessed more than 200,000 inhabitants.

The court on page 385 say: "It is not only local and special but odious in its discrimination. It is a most clear and palpable violation of the constitution which expressly withholds from the legislature all power to create or extend a lien by a local and special law.

"The difficulty here is, not that of classification only; within reasonable limits and for *some purposes* classification is allowable. It has been sustained on the basis of population of counties on the assumption that those having a small population may ultimately have one much larger. Here the larger are excluded. We cannot assume that their population will ever be reduced to less than the number named. They are therefore practically and permanently excluded by the intent and purpose of this act which is special in its terms and local in its effect."

Does not our Territorial Act exclude all cities towns, villages and places within twenty miles of any county seat from having the benefit of the act? And does it not go farther, when it is located on a railroad, does it not prevent it from being taken to any other place in the county off of a railroad. County seats are for the benefit of the people; but the locality of the county seat at a particular place is more peculiarly and especially

beneficial to the inhabitants of that place, or those in the near vicinity of it, than to those who are more distant, and especially is it more beneficial to those who might be near to it when if taken away and removed a distance of thirty miles or more, as in this case, on a straight line, and forty miles or more, by a traveled route; if that place should be in the opposite direction from the county seat to some of the places which were within twenty miles of the county seat, it would be detrimental to their interest rather than beneficial as a proposition by moving it farther from them.

The court will take notice that the City of Las Vegas and the City of Albuquerque are each situate on a railroad and that the county seat of Bernalillo County is outside of the City of Albuquerque and only about two miles distant from it, and the county seat of San Miguel County is outside of the City of Las Vegas, in the town of Las Vegas, which town and city are only divided by the river Gallinas; the court house of San Miguel being less than a mile from the railroad, and that of Bernalillo about two miles and a half only. This act, in terms, expressly excludes all cities situate like the cities of Las Vegas and Albuquerque in respect to the county seats of their counties. Albuquerque is a city of 15,000 people and Las Vegas a city of over 5,000 people and the towns in which the county seats are located are small towns, the county seats having been located in them before the railroads were constructed and they have rather gone down in population and business, while these larger towns have been built

up and would be much more convenient to the people, and certainly would be as valuable in every respect for the county seats as the two smaller towns in the two counties where the county seats actually are. Neither of those counties could have the benefit of the act without waiting ten years to get it. The county seat would first have to be changed to some place more than twenty miles distant from the city, and then it would have to wait ten years to change it back to the city. If the exclusion of the two large counties in Pennsylvania from the benefit of that lien act made the act local and special, would not the exclusion of two of the large cities, Albuquerque and Las Vegas in the state from the benefit of the act make it local and special?

In McCarthy vs. Comm. 110 Pa. St. 246, there was a constitutional provision that the legislature should not pass local or special laws regulating the affairs of counties, cities, wards, boroughs or school districts. An act was passed to regulate in certain important particulars the affairs of certain counties the population of which exceeded 100,000 and was less than 150,000.

The court say: "But by what process of reasoning is this legislation which has selected for its operation three or four counties from all those composing the commonwealth to be justified? Is the justification to be found in the well recognized legislative power of classification? We think not. It is admitted that classification, even where not specially recognized by nature, custom, the laws of trade, or the constitution must, in certain cases,

be adopted ex-necessitate, as in the case of cities under the Act of the 23rd of May, 1874; Wheeler vs. Philadelphia, 27 P. F. S. 338, and Kilgore vs. Magee, 4 Nor. 401.

"General legislation for all of the cities of the commonwealth as a single class having been regarded as impossible, the legislature first divided these municipalities into several distinct classes, and then provided laws and regulations adapted to each class. This, as we have seen, was recognized as legitimate and proper. There is here however, a new and complete classification, and not a mere cutting out of one or more cities designated by population from the general class, and in this, the act of 1874 is distinguished from that of 1883, in which no general classification is attempted, but a special legislation adopted for certain counties selected from all others and to be ascertained from their populations rather than by their names. Under the rulings in Davis vs. Clark, 10 Out. (306 Pa. St.) Commonwealth vs. Patten, 7 Nor. 260, and Scowdens App. 15 Nor. 425, this is not allowable."

"If indeed such legislation were to be recognized as legitimate, vain would be the constitutional prohibition of local or special laws. *But little ingenuity in the way of so called classification would be necessary* to isolate every single county, borough, ward, township and school district in the state and provide for each in its own local code."

This could be done by an act in New Mexico if the alleged Chapter 80 could prevail as a legiti-

mate act. If this could be done the limit could be extended to thirty, forty or fifty miles, and you could make the limit to be outlined by a varied line, one which is neither straight nor circular, so as to make the act operative on a single township or a single city. There is nothing in the act in question which gives any reason why localities within twenty miles of the old county seat should be excluded from the benefit of having the county seat. Why not say in the act that the county seat might be moved to Section 16 in any township more than twenty miles away from the county seat? Each township has a section 16 in it; and if you can exclude all the territory within the limits of twenty miles, why not exclude all of the territory except that within the limits of a particular section or of a particular township? There is an especial benefit to a place in having a county seat; but before any classification can be made with reference to places which might have the county seat, it would have to appear from the nature of the act, from its characteristics and its circumstances, wherein the act would be especially beneficial to those particular localities and not beneficial to others, if made applicable to them. For instance, take the place called Capitan, in the County of Lincoln, which is about twelve miles from the town of Lincoln and about eighteen or nineteen miles from the town of Carrizozo, but less than twenty miles from each of them, on a straight line. This place is situate on a railroad; in every respect, so far as anybody knows, there is no difference between it and Carrizozo, or any town

more than twenty miles beyond the county seat on the railroad, and no other distinction between it and any other town or village in the county, except that it is on a railroad and many of them are not. Where can it appear as to any rights or benefits arising to any one of the towns or village in the county that Capitan would not be entitled to the same? How is Capitan differently circumstanced, except as to the matter of distance, from any other town or village in the county? As a matter of fact Capitan is on the railroad; it is much nearer the center of population of the county than Carrizozo; in every respect it would be more convenient to the great mass of the people in the county than Carrizozo; it has every qualification that Carrizozo has, except that it is not more than twenty miles distant from Lincoln, and possibly there may be some difference in population, but that is not made a qualification by law. Even if it was, that would not affect the character of the law as to being valid or invalid. If you can single out all of a county, except the part within the radius of twenty miles of a given place, to have the rights to the benefit of an act and not allow those within that radius to have it, what prevents you from extending the radius or enlarging the area in any manner you please so as to exclude every place in the county from the benefit of the act, except one single place? Why can you not in such case exclude from the benefit of the act every place, except one which you may mention by name? The right, if it exists, to limit an act in its territorial operations, based upon the

question of territory alone, should have no restriction or limitation in regard to what territory might be given the benefit or excluded from the benefit. Something more than saying it shall be twenty miles distant from a given point must be shown, in order to correctly classify the territory so as to be operated upon by a general act. Suppose the county seat in the County of San Miguel was more than twenty miles away from the city of Las Vegas and the town of Las Vegas which are adjoining each other, could it be considered that an act would be general which might prescribe that the county seat of a county might be changed to an incorporated city or town in a county, but in case of change it could be made only to the one which is farthest from the county seat. Would such act be any more special or general than the one in question? Suppose, for instance, that the county of Lincoln was only forty miles square, and that outside of a circle with a radius of twenty miles, there was only one town, city or village or settlement, and that in the corner of the county, could it be said that an act of the legislature was general and not special or local which permitted the county seat of that county to be changed to the place outside of the circle and into the very corner of the county. Could it be said that when the people, cities, towns and villages lying within the limits of twenty miles of any county seat possessing the same conditions, circumstances and surroundings as those outside of that limit should not have, by an act in reference to the county seat, the same rights, privileges

and benefits as those lying outside of the twenty mile limit? That is what the act in question does; it absolutely prohibits or excludes the people within a radius of twenty miles of the county seat from applying for the change to some place within that radius, but gives that benefit and privilege to places on the outside of that radius. While all the places on the outside of that radius might be less qualified and less suited for a county seat than any one of those inside of the radius. The instances of the cities of Las Vegas and Albuquerque are as strongly suggestive of why this limitation of twenty miles was placed in the law, particularly the city of Albuquerque, which probably contains as much or more population than all the remainder of the County of Bernalillo and could, without doubt, easily get up the necessary petition for the change and easily by a majority vote make the change. Could it be said that there was anything in the conditions and circumstances of Albuquerque which unfitted it to be a county seat, if so, we would like to hear what it was? If this law is void as to its operation upon any county in the Territory, it is void as to its operation upon every one. It cannot be held void as to part not void as to the whole. As a matter of fact, a radius of twenty miles from the town of Albuquerque would exclude from the operation of the act, nearly every town, city, village or settlement in Bernalillo county. Suppose Bernalillo county should be reduced in size until its entire area might be included in a circle of forty miles diameter; or suppose the act in question should be changed to

make a circle of seventy or eighty miles in diameter, that would include every inch of territory in the county of Bernalillo, so that the people of that county could not get the benefit of that act if it was otherwise legal, and such would be the case if the limit was made large enough to cover the entire county of Lincoln or to cover all of it except one section, which could be done if the act in question is valid.

In Scowdens App. 96 Pa. St. 424-5, which was a case where the legislature, as the court say, passed an act in 1879, framed with a view to avoid the unconstitutional features which had been decided to exist in the previous act on the same subject. The act provided "that in all counties of this commonwealth where there is now or may hereafter be a population of not less than sixty thousand inhabitants and in which there is now or may hereafter be any incorporated city of the fifth class, subject to the provisions of the Act of 23rd of May, 1874, and the several supplements thereto, or which may be incorporated under said act, it shall be the duty of the president, judge or the additional law judge, or of either, upon the application of the mayor and council of such incorporated city to make an order for the holding of one week of court, or more, if necessary, at the discretion of the court, after such regular term of the court of said county for the trial of civil or criminal cases in said city."

That court, in commenting on that law, said: "It is no part of our business to discuss the wisdom of this legislation. However vicious in prin-

ciple we might regard it, our plain duty is to enforce it, provided it is not in conflict with the fundamental law.

"It requires but a glance at the act to see that it is an attempt to evade the constitution. *It is special legislation under the attempted disguise of a general law. Of all forms of special legislation this is the most vicious.*"

Is not the New Mexico Act, Chapter 80 of the Laws of New Mexico of 1909, special legislation under an attempted disguise of a general law? Why make the act applicable only to a certain section of the county and exclude from it the best and most populous part of it? Why say that the county seat shall be located over on one side of the county, or in one corner of it, because to exclude it from an area of territory embraced within a circle with a diameter of forty miles, in nearly every instance the county seat would be shoved over, if changed, to a remote locality near the edge of the county or into an unoccupied section of the country, and the people living within the range of twenty miles of the old county seat would have no opportunity to set up their claims to it. Unless this court shall hold that the location of a county seat within any particular city, town, village or settlement is in no manner a benefit or advantage to such city or town or the people thereof, this act cannot be held to be anything but local and special. Is not the location of a county seat in a city, town or village of some special benefit to that town, city or village and the people thereof?

The case of Devine vs. Commissioners, 84 Ill. 591-2-3-4-5, is a very instructive case, with reference to what is local and special law. Under the constitution of Illinois, which contains the exact provisions of the Springer Act and from which the Springer Act was taken, an act was passed by the legislature for the issuance of bonds for the erection of a court house on the site which had been used for a court house and jail and other necessary public buildings for the use of the county, by the terms of which said act it was limited to counties containing over 100,000 inhabitants. The court on page 593 say, speaking of the act: "That it is a local or special law applicable only to Cook County, is a proposition so plain it would bear no discussion, and unless its passage can be justified, for some reason, it is invalid."

In Klokke vs. Dodge, 103 Ill., 126, the legislature in 1881 passed an act "to extend the jurisdiction of county courts in counties in which probate courts are or may be established," and provides: "That in all counties in which Probate Courts are or may hereafter be established, county courts may have concurrent jurisdiction with the circuit court in all cases at law and in equity, except criminal cases where the punishment may be death or confinement in the penitentiary." It was held by that court that the act was unconstitutional, that the extended jurisdiction attempted to be thereby conferred being restricted to county courts in certain counties and not affecting the county courts in all the counties in the state alike,

was within the inhibition of the constiution.

In Iowa the constitution contains provisions similar to that of the Springer Act. The legislature undertook to legalize certain ordinances in the city of Dubuque, granting to a company the right to occupy a street and construct a street railway therein and operate the same, it was conceded that the ordinance of the city was ultra vires, and the court held that the constitution which prohibited local and special legislation prohibited the legislature from validating that ordinance.

There is another reason why this law, according to the expression of many authorities, is local and special. Chapter 80 of the printed laws of 1909, if it ever was legally enacted, is an amendment of section 630 of the Compiled Laws of New Mexico of 1897, which reads as follows:

> "No. 630. Whenever the citizens of any county in this territory shall present a petition to the board of county commissioners, signed by qualified electors of said county, equal in number to at least one-half the legal votes cast at the last preceding general election, asking for the removal of the county seat of said county to some other designated place, which petition shall be duly recorded in the records of said county, said board shall make an order directing that the proposition to remove the county seat to the place named in the petition be submitted to a vote of the qualified electors of said county, at the next general election, if the same is to occur within one year from the time of presenting said petition, otherwise at a special election to be called for that purpose within six weeks from

the date of presenting said petition: Provided, that before making such order the said commissioners shall require a written guaranty from responsible citizens of the place to which the petitioners desire the county seat removed, that they will provide, free of cost to the county, a suitable site and sufficient ground for a court house and jail, and that they will pay to the county treasurer a sum not less than eight thousand dollars to be used in constructing such court house and jail, in the event that the proposition for removal shall receive a majority of the votes cast at such election, and Provided Further, That the city, town or village named in the petition shall be at least twenty miles distant from and of a larger population than the then county seat of said county; and that no proposition to remove a county seat from a city, town or village, situated on a railroad to one not so situated, shall be entertained or voted upon, and that no vote shall be ordered on substantially the same proposition oftener than once in ten years."

It will be seen by comparing section 630 with the amended section 630 that the amendment was made apparently for the purpose of affecting a particular county. Section 630 as it appears in the Compiled Laws of 1897 requires that the petitioners in any event, if the proposition shall be adopted by the people, shall pay to the county treasurer eight thousand dollars to be used in constructing such court house and jail. That provision is omitted from the amendment as contained in said alleged Chapter 80, and a proviso is inserted in lieu thereof, which says:

"PROVIDED, that whenever it is proposed to remove a county seat of any county which has public buildings consisting of a court house and jail, the original construction of which cost said county more than the sum of thirty thousand ($30,000) dollars such cost to be ascertained from the records of the Board of County Commissioners of said county, then before said board of commissioners, shall make such order so submitting such proposition to remove the county seat, to the qualified voters of said county, shall require from the petitioners or persons interested in the removal of said county seat, a deposit of forty thousand ($40,000) dollars in money, which said deposit shall be placed in the treasury of said county, which said sum of money when so placed in said treasury shall be used in the construction of a court house and jail in the event that the proposition for the removal shall receive a majority of the votes cast at such election, but such deposit shall not be required as a condition precedent to submitting such proposition for the removal in counties which have no court house and jails, the cost to the county of which, as ascertained from the records of said county commissioners is less than said sum of thirty thousand ($30,000) dollars as aforesaid; but the same shall be required in all cases when it is proposed to remove a county seat from a point situated on a railroad to another point also so situated."

It will be seen that this amendment was so prepared as to do away with the necessity of paying into the treasury eight thousand dollars in any event, regardless of the cost of the former court house and jail, and also it was so prepared that the thirty thousand dollars should not be paid in

unless the original cost of the old court house and jail at the old county seat should amount to thirty thousand dollars to be ascertained from the records of the county. It was well known at the time this act was passed that possibly the original cost of that jail and court house in Lincoln County and the town of Lincoln would not amount to the sum of thirty thousand dollars, and this act was prepared with the express view of getting rid of the clause requiring eight thousand dollars to be paid in and to make the county pay the total amount of the costs and to avoid the requirements that the county should be reimbursed in any degree for the outlay that it had in the court house and jail already existing, as the amount is placed so high it is impossible for the county of Lincoln, although that county is not specifically mentioned, to show the actual and original cost up to that amount, although the proofs did show very close to it, and in fact as much as that, but the court construed that some of the costs shown by the records were only made for repairs and not as original costs, as will be seen by reading the opinions of the court which will be found in the record. We insist that when an act has been passed, although in a certain way it may be of a general nature, yet if it has the effect of operating specifically and directly upon a particular county, as this one does upon the county of Lincoln, to single it out from all other counties owing to its particular condition as to court house and jail, that such act for that reason is local and special.

Appellants feel it is their duty to call to the at-

tention of the court the case of Codlin v. County Commissioners, 9 N. M. 577. In that case the Supreme Court of New Mexico passed upon some of the provisions of section 630 as they are contained in the Compiled Laws before the pretended adoption of the amendment by Chapter 80 as aforesaid. The court in attempting to construe the twenty mile limit as provided in the original section, and which is copied into the amended section, said, quoting from the original section 630 "That the city, town or village named in the petition shall be at least twenty miles distant from and of a larger population than the then county seat of said county." The court will notice that in the original section the words "and of a larger population than the then county seat" are not copied into the amendment, but are omitted for obvious reasons. The town of Lincoln was a much larger town than the town of Carrizozo. In that case the court further said:

> "These conditions are entirely just and reasonable in the light of what has been said, but, further, the legislature is presumed to have knowledge of the conditions existing in the territory; also of its counties, cities, towns and villages, and of their location and population. It must be presumed to have known that most of the cities and towns of the territory are comparatively small, and in some instances unsuitable for the accommodation of the court, that in many instances especially along the railroads, new cities and towns have been established within one or two miles of each other. Knowing these facts and conditions to exist, it is reasonable

to believe that the legislature in these enactments intended that county seats should be established in the larger cities where the courts and the people attending them could have suitable accommodations and that hereafter county seats shall not be located in smaller cities and towns than those in which they now are. It is also reasonable to believe that the legislature intended, in fixing the twenty mile limit, to prevent cities and towns situated within a few miles of each other from engaging in those injurious contests for the supremacy for the location of the county seat, based upon the population only."

This quotation submits two propositions. The first that the intention of the legislature was that "county seats should be established in the larger cities where the courts and the people attending them could have suitable accommodations and that hereafter county seats shall not be located in smaller cities and towns than those in which they now are." The language of the law to which that alludes was left out in the amendment in Chapter 80, and the reason was, without doubt, that Lincoln was a larger town that Carrizozo, or at least it would require them to go into a controversy between the two towns to ascertain which had the larger population. The petition in that event would have had to set up the fact that Carrizozo possessed a larger population than the town of Lincoln and that would have had to be determined as a fact. By the amendment that was eliminated and the county seat was sought to be changed regardless of the population of the towns of Carrizozo and Lincoln and in disregard of that partic-

ular reason given by the court why that twenty mile clause was inserted in the original law of 1897. As that was omitted in the amendment, that reason for inserting the twenty mile clause falls to the ground, but the Supreme Court in its decision also said:

> "It is also reasonable to believe that the legislature intended, in fixing the twenty mile limit, to prevent cities and towns situated within a few miles of each other from engaging in those injurious contests for the supremacy for the location of the county seat, *based upon the population only.*"

Just what is meant by that is not sure, but we would suppose that the court meant by it that other towns within the limits of twenty miles of the county seat might have larger populations than the town of Carrizozo, or even Lincoln, and that it was the intent of the legislature to avoid taking into consideration the question of population, which would be directly in conflict with the other provision of that opinion, but the other part of the reason given, we believe, is without any good, substantial foundation, and that is to prevent citis and towns situated within a few miles of each other from engaging in those injurious contests for the supremacy for the location of the county seat. Why would that be any better reason than to say that those to the extreme limits of the county should be prohibited in engaging in such injurious contests? If that was the reason, then surely the act must have been special and local, because it prevented towns which might

have a larger population and be more favorably situated than those which have a similar population and were not so favorably situated from engaging in what is styled "injurious contests" for the county seat and allowing the exclusive and sole privilege to be enjoyed by those more than twenty miles distant to engage in such contests. It can hardly be believed that that reason will receive consideration at the hands of the Supreme Court of the United States. It does not seem to us to have any foundation or logic in it. It is without reason and contrary to the very spirit of the prohibition in the "Springer Act," and certainly shows, if it shows anything, that a distinction was being drawn between two parts of the county, giving a preference, privilege and benefit to one part of the county more remote over another part of the county more immediate, and of better and greater facilities and possibly more population. We have referred to this case because we know that appellees rely upon it as being an adjudication of this matter in the Territory of New Mexico, but we do not believe that it is an adjudication of the matter because the principal argument made by the court which may possess any reason in it was eliminated by the amendment intended to be enacted by Chapter 80, that is the provision that the intent of the legislature was to provide for the removal of county seats from smaller towns to larger cities where courts and people attending them could have suitable accommodations, and that thereafter county seats should not be located in smaller cities and

towns than those in which they then were. That argument, we say, might have some force in it, but the alleged amendment under which the proceedings were had eliminated that provision of the statute to which that argument applied, and therefore that argument of the court to establish the validity of the twenty-mile limit falls to the ground with the limitation and the other point falls by its own weight.

II.

CHAPTER 80 OF THE LAWS OF 1909, EVEN IF IT WAS NOT A LOCAL OR SPECIAL LAW, NEVER WAS LEGALLY ENACTED, WAS NOT APPROVED BY THE GOVERNOR NOR WAS IT EVER SIGNED BY THE PRESIDENT OF THE COUNCIL OR SPEAKER OF THE HOUSE OF REPRESENTATIVES. THERE IS NO EVIDENCE THAT IT EVER REACHED THE GOVERNOR MORE THAN THREE DAYS BEFORE THE ADJOURNMENT OF THE LEGISLATURE.

Sec. 1842, U. S. R. S., provides "Every bill which has passed the legislative assembly of any territory shall, before it becomes a law, be presented to the governor; if he approve he shall sign it; but if not, he shall return it, with his objections, * * * If any bill is not returned by the governor within three days, Sundays excluded, after it has been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislative assembly by adjournment sine die prevent its return, in which case it shall

not be a law."

The original bill, Council Bill No. 86, being Chapter 89, has been introduced in evidence, that is a certified copy of it, made by the Secretary of the Territory, duly authenticated by him, that bill although it passed both houses never was enrolled or engrossed, as shown by the finding of facts. (T. R. in No. 653, p. 35 and T. R. in No. 889, p. 16 near the bottom).

The original bill as introduced in the Council was the copy filed to represent an enacted law by the Secretary of the Territory. This copy shows that the Governor's signature is wanting; it also shows that the signatures of the President of the Council and the Speaker of the House of Representatives are wanting. The statement of facts in T. R. 653 at the bottom of page 35 finds "The said bill filed as said act, does not have the signature or approval of the Governor affixed thereto; nor does it have the signature of the Speaker of the House of Representatives or the Presi of the Council attached or affixed thereto." And in the finding of facts in No. 889, page 17, near the top, it is stated that it "did not bear the signature of either the President of the Council or Speaker of the House of Representatives, nor does it bear the signature of the Governor of the Territory, nor the approval of the Governor of the Territory." There is no certified statement, nor evidence of any kind whatever showing that Council Bill No. 86 if it did pass both Houses, was ever presented to the Governor, or if it ever did come into the possession of the Governor,

when it so came into his possession.

Rule 5 of the House provides, that "The Speaker shall sign all bills passed by the House." (Statement of Facts T. R. No. 653, p. 36.) Also Rule 9 of the Council, provides "All acts, addresses and joint resolutions shall be signed by the President." (Finding of facts in T. R. No. 653, p. 35, and T. R. No. 889, p. 16.) These rules are matters, the making of which belong to each House respectively. They are essential and necessary for the proper conduct of the business of each House and cannot be dispensed with.

This proposition is well sustained by the precedents which come down to us from the Common Parliamentary Law of Great Britain, after which all of our legislative bodies have copied, but it is particularly sustained by the fact that the Constitution of the United States, like our laws, does not provide for any rules to be adopted by Congress but it leaves it to those two Houses to adopt rules for their procedure according to the uses and customs which have prevailed in such bodies commencing with the British Parliament and coming down to our time.

In Field vs. Clark, 143 U. S. 671, that court say: "Although the Constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two Houses, usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.

"The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to co-equal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in

conformity with the Constitution.

"It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is, it cannot be regarded as a law of the United States if the journal of either House fails to show that it passed in the precise form in which it was signed by the presiding officers of the two Houses, and approved by the President." (See cases cited.)

To the same effect is Panghorn vs. Young, 32 N. J. L. 30; there are many other decisions to the same effect.

It is recognized in many of the State Constitutions and in all Legislative Bodies that rules of procedure and transaction of business are essential to their success in doing business. Those rules are so made that they are absolutely binding upon the respective legislative bodies, and more especially upon the officers of those bodies. An officer cannot disregard or violate the rules; they cannot be overstepped and can only be evaded in their operation and effect by an affirmative assent thereto by the body itself and then generally requiring a two-thirds vote to do so. These rules of different legislative bodies have the force and effect, generally, of law, and bind the body equally as a law would bind them in the transaction of business therein. The executive of the government cannot ignore these rules; he cannot make a bill become a law when the rules have been violated in passing it or in bringing it to

him; he is a co-ordinate branch of the government.

The Legislative Assemblies of the Territories are the agents and representatives of Congress in the Territory; their authority is delegated authority from Congress. When Congress authorized those legislatures to meet, they met as a substitute for Congress to enact law for the benefit of the Territory, and as such substitute or delegated authority they were governed by the same provisions of the Constitution as Congress is governed. The Constitution of the United States, in Article 1, Sec. 3 thereof, provides that "each House may determine the rules of its proceedings, punish its members for disorderly conduct and behavior, and with the concurrence of two-thirds expel a member.

"Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy."

These are the provisions of the Constitution governing Congress, and they come down to the New Mexico Legislature to govern it, so far as they are applicable, as the common law of this country, the legislature being the agent or substitute for Congress in passing legislation for the Territory. The English Parliament, from which we derive the Common Law of Parliamentary Practice, except as modified by the practice in this country, particularly by the Congress of the United States, is common law to us in this Territory. We have adopted the Common Law

of England as recognized in the United States as the law of this Territory, and when the legislative bodies of our legislature adopt a set of rules and provide therein that those rules shall not be suspended or set aside, except by a two-thirds vote of the body, those rules become a law to the respective bodies, as adopted by each of them, and cannot be varied except by a two-thirds vote. A law cannot be legally enacted in the face of those rules. A statute cannot be passed and enacted into law without a compliance with those rules. It is true, when a bill has been enrolled and is duly signed by the presiding officer of each House, that makes a prima facie case that the rules had been complied with; and to contradict that proposition, the burden is thrown upon the party denying it. In our case the presiding officer of neither House signed the bill, and as the rules require him to do it, the absence of his signature makes a prima facie case that the bill had not passed or the rules had not been complied with, and the burden of proof is then thrown upon the party denying that proposition, even if it was possible to overcome that objection by any other proof than the actual signature of the two presiding officers. And when a bill appears in the statute book apparently as a law, as in this case, if that bill also has not the signature of the Governor, who is required to sign the same, except in certain contingencies, a prima facie case is made that the bill never became a law, and the burden of proof is then thrown upon the party claiming that it had become a law to prove the

exception that would make the bill a law. The only exception that can be proven to make the bill a law in the absence of the Governor's signature would be positive proof that the bill was enrolled in accordance with the rules of the House and Council and the law in such case made and provided, and presented to the Governor for his approval on a day full three days previous to the adjournment of the legislature. The bill in this case, as well as the act, an authenticated copy of which has been introduced, does not show that said bill reached the Governor's hands for approval or for any other purpose three full days before the adjournment of the legislature; that is to say, the legislature adjourned on Thursday, the 18th of March, 1909, the bill must have reached the Governor on Monday, the 14th day of March, or it could not have become a law. There is no legitimate proof in the record anywhere that that bill did reach the Governor as early as Monday. There is an extract which had been introduced from the printed book purporting to be a Council journal of that session of the legislative assembly, but to which there is attached no statement or certificate, or anything else showing that it was printed by authority of the Territory or of the government of the United States, in which statement it is undertaking to say that the Governor has allowed Council Bill No. 86 to become a law by limitations.

Even that statement does not tell when Council Bill No. 86 was received by him. His statement in that regard was a mere conclusion of his own;

he did not give the facts and the details on which it was based; he had no right to decide or proclaim, as Governor, that the law had been complied with without giving the manner and details as to how it had been complied with, nor was he the officer to certify to or announce that fact; he was not a judge at the time in making said statement, nor had he any authority to make such a statement. The only person who could have made such a statement, and then it must have been made showing the facts, especially the date on which the bill was received by the Governor, was the Secretary of the Territory. He must have added his certificate to the bill showing that it had been received by the Governor more than three days before the legislature adjourned and that he had not returned it to the Council with his objection, and therefore that it could become a law without his approval, and he should have endorsed upon it the date it was received by the Governor as was done with regard to the Tariff Act in the 53rd Congress of the United States, when President Cleveland failed to sign that bill.

Cooley on Const. Lim. 7th Ed. 124, says: "In considering the powers which may be exercised by the legislative department of one of the American States it is natural that we should recur to those possessed by the Parliament of Great Britain, after which, in a measure, the American legislatures have been modelled, and from which we derived our legislative usages and customs or Parliamentary Common Law, as well as the precedents by which the exercise of legislative power

has been governed. It is natural also, that we should incline to measure the power of the legislative department in America by the power of the like department in Great Britain; and to concede without reflection that whatever the legislature of the country from which we derive our laws can do, may also be done by the department created for the exercise of legislative authority in this country."

How much more then is the legislative power which was exercised by the legislature in this Territory governed by the precedents set by the Congress of the United States, its creative authority, and in lieu of which it acted in the Territory. It stands as an agent or substitute for the Congress of the United States in the enactment of laws applicable to this Territory, and like any other agent or substitute should be and is governed by the same established precedents, principles and general procedure as may be applicable in its procedure in the enactment of laws. Congress, in the Organic Act, does not require a journal of the procedure to be kept, but in speaking of the veto power of the governors of the territories it refers to the fact that each body does keep a journal and requires that the veto of the Governor shall be entered in the journal and that the ayes and nays shall be called on the passage of the bill over the veto and entered in the journal, thus practically recognizing the same procedure in regard to a journal and its contents as is maintained by Congress itself, so that we must take our precedents in the first place from the

Congress of the United States and through it from the Parliament of Great Britain; and also the same procedure when not prescribed expressly by statute, as practiced by the Congress of the United States in reference to acts which become law without the approval of the President must be adopted here and recognized here, and the same steps taken to show the fact that the act had become a law without the approval of our Governor. We refer the court again to the procedure which is shown in reference to the Tariff Act of 1894, which became a law without the signature of President Cleveland. At the end of that Act, in Volume 28, United States Statutes at Large, 570, is the following: "Received by the President, August 15, 1894." Then immediately following: ("NOTE BY THE DEPARTMENT OF STATE.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.")

The court will observe by the foregoing what the practice of the Congress of the United States is, and without doubt will hold that our practice should be similar in New Mexico. Reason and common sense would require the practice to be fully as much in detail as that of Congress. The act should show when the bill was received by the Governor. The courts take notice when Congress adjourns as well as when the legislature ad-

journs. That Congress adjourned on the 28th day of August, 1894, thirteen days after the date at the bottom of the Act, shows it was received by the President more than ten full days before the adjournment of Congress; but as the Act of Congress which makes the provision with reference to a bill which has passed the legislature becoming a law without the signature of the Governor, also provides in the exact language of the constitution, except as to time and the application to the Territory; Section 1842, U. S. R. S., which says: "Every bill which has passed the Legislative Assembly of any Territory shall, before it becomes a law, be presented to the Governor. If he approve he shall sign it, but if not, he shall return it, with his objections, to that House in which it originated, and that House shall enter the objections at large on its journal and proceed to reconsider it. * * * If any bill be not returned by the Governor within three days, Sundays excluded, * * * after it had been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislative Assembly, by adjournment sine die prevent its return."

The 7th Section of Article 1 of the U. S. Constitution provides (2nd Paragraph): "Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the House in which it shall have originated, who shall

enter the objections at large on their journal and proceed to reconsider it. * * * * If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

It will be thus noticed that Section 1842, U. S. Statutes which is the Constitution for New Mexico in part, is taken bodily from the Constitution of the United States, excepting the changes as to time and to make it applicable to the territories. The Constitution of the United States does not provide what the evidence shall be as shown by the act itself to make it a law without the approval of the Governor, but as the date of approval of an act by the President is always placed at the bottom of it with his signature, so is the date on which an act is received by the President which becomes a law without his approval placed at the bottom of the act. This is necessary and just as essential as the approval of the President, because the approval by the President completes the act and makes it a law. The date of the receipt of the act by the President must be placed there in like manner to show that the act was received more than ten days before the adjournment of Congress, in order that thereby it would become a law. In the printed statutes they do not print the President's signature when he approves an act, but they only print at the foot of the act the word "Approved"

giving the date of the approval, leaving off the President's name, which is attached to the word approved and date, by the President to the original. If an act was printed in the laws and did not show upon its face that it was approved by the President or had been returned by him to the House in which it originated with objections, and that the same had been passed by both Houses by two-thirds vote over his objections, or if it did not show that it had been received by him more than ten days before the adjournment of the Congress, and the original act which was enrolled and on file in the office of the Secretary of the State, did not show such facts, would anyone have the hardihood to claim that such had become a law? And the same argument applies in this Territory.

Even if Governor Curry's message, which must have been written before 3 o'clock p. m. of the last day of the legislature, that being the hour certified to by the Secretary of the Territory, that Council Bill No. 86 was filed with him, does say that he allowed Council Bill No. 86 to become a law by limitation, does that show when Council Bill 86 was received by him, if ever received; does it show that it ever was received? Is there anything to show what was the construction placed upon the word limitation? What particular facts went to make up that limitation? There is not a word of proof, or a line, or a scintilla of evidence showing that Council Bill 86 was received by the Governor as early as Monday, March 15th, which was the latest day it could

possibly have been received by him, to make it become a law by the expiration of the last legislative day of that session March the 18th. But when that message was sent the day had not expired, and it may be that Governor Curry, even if he had received the bill, as it appears he did not approve of it, may have returned it to the Council with his objections at the last moment. If he received it on Monday, March 15th, it could not have become a law at 3 o'clock p. m. of March the 18th, because those printed journals, if they are evidence at all, must be taken notice of by the court, and they show that the Council adjourned between 11 and 12 o'clock at night of that day. Before Governor Curry could say in a message that the act had become a law, that entire day must have expired, unless he received the bill as early as Saturday, the 12th of March. But none of those facts are shown.

When we have made a prima facie case as we have in this case that the bill was never signed by either of these officers and was not signed by the Governor, we say the burden of proof immediately goes to the defendants to establish every fact necessary to make that bill a law. As the proofs stand there is no doubt or question as to the bill never having become a law. There is wanting every essential element assuming that it passed both Houses, which facts we deny and say has never been legally proven; there is not another single necessary element appearing in the evidence anywhere to show that anything was done with the bill to make it

become a law. The endorsement upon the bill itself is not legal evidence, but if it was, it does not show that it was signed by either of those officers, or that it was presented to the Governor, or if presented, when it was presented. These are facts after the case made out by the plaintiffs which required affirmative proof by the defendants to show that all necessary steps were had to make the bill a law. They seemed to realize that that burden was thrown on them and undertook to introduce some facts from the printed books styled or called journals of the Houses; but even that, if evidence, did not reach the point of showing that the Speaker and President had signed the bill or that it had actually been delivered to the Governor on any day more than three days prior to the adjournment.

The plaintiff made a prima facie case, and the burden was thrown on defendants to establish the necessary facts to show that Chapter 80 has become a law by legal enactment.

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In State vs. Swift, 10 Nev. 185, the court in deciding as to what a party would look in order to ascertain what was the statute, say: "The question frequently arose in England, but the rule was uniformly maintained that the court would look to the statute-roll and to that alone."

The case of Sherman vs. Story, 30 Calif., 256-7, is a very instructive case and contains reference to various cases as to the common law on the subject which is held to be still in force in nearly all States, except as modified by the constitutions and statutes. The last case says: "The evidence

of the Acts of Parliament or of the Legislature which are made matters of record must be the records of those acts, as much so as the records of courts of justice. In England, general acts are always enrolled by the Clerk of the Parliament and delivered over into the Chancery * * * When enrolled, the enrolled act itself was the original record, and the record was conclusive. * * * * But now suppose that the journals were in every way full and perfect, yet it hath no power to satisfy, destroy or weaken the act which, being a high record, must be tried by itself, *teste meipso*. *** But if the record of the act itself carry the deathwound in itself, then, it is true, that the parchment— no, nor the great seal, either to the original act or to the exemplification of it—will serve as in the 4 H. 7, 18, where the act was by the King and with the consent of the Lords, (omitting the Commons) and was judged therefore void. And he that observes the case 33 H. 9, 17, which was the only case relied upon by the defendant's counsel, shall find it so; and upon this rule the doubt to be conceived, namely upon the Parliament roll itself, not upon the journal." (Hob. 110, 111).

In this case, the validity of the act must be treated by the act itself, as it has been filed in the Secretary's office, the original bill alone being used, there being no enrolled or engrossed copy. That original bill has been made to take the place of an enrolled copy. Evidently because of the shortness of time before the expiration of the session there was no opportunity sufficient to

have it properly enrolled. The effective character of the original bill used as an enrolled bill must be the test of the legitimitacy as an act. There is no signature of either of the presiding officer annexed to or attached to it. The signature of the Governor is wanting. These are both made essentials to its validity. There is no signature showing that the bill was passed in either House coming from a presiding officer thereof. There is no proof aliunde to that effect. There is nothing attached to the bill showing that it was ever received by the Governor, or if received, that it was received more than three days before the adjournment and had become a law by reason of the Governor failing to veto it or return it with his objection. There is no certificate to it signed by anyone that it had become a law by lapse of time after receipt by the Governor, without his approval, even if such certificate would be sufficient. There is only a statement inserted after the title of the act in the printed copy of the act following the words C. B. No. 86; saying "Law by limitation 'March 18, 1909.'" These words are not included in the original record on file in the Secretary's office, a correct copy of that record is set out in full in the evidence in pages 16 to 19, both inclusive, including therein the certificate of the Secretary attached to the said bill, and including therein all the endorsements on the said bill as it passed the Council and House and as they exist on the said bill as it is filed in the Secretary's office and used as the original.

III.

THE PROVISIONS OF THE SECOND CLAUSE OF SECTION 631 OF THE COMPILED LAWS PRESCRIBING THE FORM OF THE BALLOT IS NOT AND CANNOT BE MADE APPLICABLE TO THE ELECTION IN QUESTION, THE BALLOT AS PRESCRIBED IS IN AN UNINTELLIGIBLE FORM TO THE AVERAGE VOTER, IS DECEIVING AND MISLEADING AND MAKES IT UNCERTAIN TO THE AVERAGE VOTER HOW HE SHOULD VOTE, AND THIS IS ALSO APPLICABLE TO THE ORDER FOR THE ELECTION WHICH PRESCRIBED THE FORM OF THE BALLOT.

The second paragraph of Section 631, C. LL. reads: "The ballots to be voted at such elections shall have printed thereon the words: For County Seat——, with the name of the place for which the voter desires to cast his ballot either printed or written thereon."

There is no instruction or direction contained in the law or in the order of the Board of County Commissioners ordering election as to how each voter shall vote. It does not say that those who wish to vote for the change in the county seat shall vote yes, and those who wish to vote against it shall vote no, which is the proposition that the law requires to be submitted, nor does the statute or the order direct that a voter desiring to vote for the place to which the petition asked the county seat to be removed shall insert the name of that place, and particularly it does not direct

or instruct the voter who may object to changing the county seat to the place petitioned for how he shall cast his vote. There is no other proposition submitted or which can be submitted under the law, except the one mentioned in Section 630 C. LL. as amended, which says the "Board shall make an order directing that the proposition to remove the county seat to the place named in the petition, be submitted to a vote of the qualified electors of said county." That is the proposition, to-wit: Shall the county seat be removed to Carrizozo? How can that proposition be fairly and justly submitted to the consideration of the people by a ballot which is in the form designated "For county seat———," with the name of the place for which the voter desires to cast his ballot either written or printed thereon? How would the people who wish to vote against Carrizozo vote? There was no question as to changing the county seat to any other place. Suppose a party voted that ballot as prescribed by the statute, but did not fill in the name of any other place, would that ballot be valid, could it be counted? No place was designated. Suppose the people living in other precincts outside of the precinct where the town of Lincoln is situated, but within a radius of twenty miles of Lincoln, or living anywhere else in the county, had voted for Capitan or any other town within that radius outside of Lincoln, would those votes be valid? The law does not permit the county seat to be changed to one of those places and the vote would be for an illegal proposition.

Or suppose the vote had been filled in for the town of Lincoln, alone, would that be valid? A vote to change the county seat from Lincoln to Lincoln would be merely a *nudum pactum*, and of no value. It is true that such vote might create an inference that such voters wished the county seat to remain at Lincoln. But would such vote have any validity? Even if the votes with Lincoln inserted might be valid, yet there may have been many people in the county who did not wish the county seat removed to Carrizozo and yet would like to change it from Lincoln to their own locality, or to some other place. Yet, under this proposition, even though they might get a majority of all the votes they could not have the county seat removed to their place. It might be indifferent to them whether the county seat stayed at Lincoln or removed to Carrizozo; under such circumstances they would refrain from voting, knowing full well to vote according to their own desires would be a nullity and not secure them the county seat, even if they had a majority of all the votes.

We insist that the law is confusing, misleading, and renders the question doubtful to the voters, and that when such a law provides for an election wherein the voter may not have a clear, unquestioned and intelligent idea as to what is to be accomplished by his vote, it cannot be presumed that the voters will turn out and cast a vote which may not amount to anything, because we insist that a vote in blank, or a vote for a place to which the law prohibited the coun-

ty seat to be removed would be a vote in blank and could not be counted. The voter who stood indifferent as to the removal to Carrizozo and who preferred another place would naturally not go to the polls to do a vain thing. The question submitted, according to Section 630, was as to whether the change could be made to Carrizozo and not to any other place. The voter had no election, except to vote, yes or no. Suppose the voter had filled in the name of Carrizozo in the blank space in the ballot, and then written No after it, would that not have expressed his iden that he did not want it to go to Carrizozo? If he had written in the ballot, Capitan alone, or Capitan yes, that might have expressed his wish or preference, but he could not accomplish it even if he got a majority. Questions wherein the expenditures of public money resulting necessarily in the wasting of public property as this one was should be placed so plain, clear and positive before the voter that he could not mistake his rights or his obligations. It is not clear to the mind of the ordinary voter in this Territory, many of whom are poorly educated, and many of whom as the evidence shows in this case, in that county, could not either read or write and did not understand the English language, under that law how he should cast his vote. When the law said that he could insert whatever place he desired, might he not think that he could get the county seat to that place and might he not also come to the conclusion that by dividing up their votes they would lose it, because they could not get a

majority for their own place and if it was wtihin the twenty mile limit it was expressly forbidden to be voted for, and if out of the twenty mile limit it was not in the purview of the order of the Board calling the election. Where a question is not fairly, intelligently and plainly submitted to the voters in a way that they can understand, but in a way that they may misunderstand it, we insist that such an election on such a question is a nullity. Questions like these affect the public interests of every man in the county.

IV.

THE ELECTION WAS VOID BECAUSE NO PETITION "ASKING FOR THE REMOVAL OF THE COUNTY SEAT OF SAID COUNTY TO SOME OTHER DESIGNATED PLACE," OR TO CARRIZOZO WAS EVER PRESENTED TO OR ACTED ON BY THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, WHEN THEY CALLED THE ELECTION TO BE HELD AUGUST 17 1909.

The foundation for the election in this case, if the statute was valid, to authorize it, was the petition which that statute made it necessary to be presented to the County Board. No petition whatever was presented to the County Board asking for the removal of the county seat of Lincoln County to Carrizozo. The only petition which was presented requested the Board "*to call* an election to submit to a vote of the qualified electors of said County of Lincoln the proposition to

remove the county seat of said Lincoln County to Carrizozo, a town situated on the El Paso & Southwestern Railway." That was a petition not asking for the removal of the county seat to Carrizozo in any manner whatever. It did not suggest in any manner whatever that the parties who signed the petition wished the change made, but only that they would like to have that proposition voted upon. The petition required by the alleged statute had to be in affirmative form expressing the desire that the county seat should be changed to the place designated, and not merely that the people be given an opportunity to vote on the proposition. As we say, this petition is the foundation of the right to hold the election if the law be valid at all, and it is mandatory that the petition be in the shape the law prescribed it should be. An election cannot be held without having the petition exactly as prescribed by the statute. There is no expression in the petition by the Board of County Commissioners that there was *any desire to change* the county seat; that was an essential element to be included in the petition. A mere expression of a desire to have an election to submit to the voters the proposition to remove the county seat might be a petition signed by persons every one of whom did not wish the county seat removed, but wished the question settled for ten years at least, believing that to be an opportune time to do that; or at least a large number of the signers of that petition must have so thought and believed, because it is shown by the testimony

that the party who was circulating the petition, and many of those who signed it did so under the statement or belief that it was to keep the county seat at Lincoln, and not change it. The court can well see how a petition of this kind, which did not inform the signer that he was actually asking for the removal of the county seat to Carrizozo, as the statute required he should do before an election was held, might be deceived and doubtless was deceived by believing that the petition only was asking for a vote on the proposition, and believing that the time was opportune for them to vote on it so as to retain it at Lincoln. This proposition is sustained by the authorities:

Lilly v. Lakin, 56 Ala., 122.
Tally v. Grider, 66 Ala., 122.
Lanier v. Padgett, 18 Fla., 843-4.
McKinley v. Commissioners, 26 Fla., 264, et seq.
Zeiler v. Chapamn, 53 Mo., 405-6.
State ex rel Lexington v. Saline Co., 45 Mo. 242.
State v. Saline Co., Ct. 48 Mo., 390.
State v. Woodson, 67 Mo. 336.
State v. Albin, 44 Mo., 348-9.
Detroit v. Bearss, 39 Ind., 598.
Peoples Bank v. Pomona, 48 Kans., 55.
Culver v. Hayden, 1 Vt., 282. 377
Blackwell Tax Titles, 213.
Pitkin v. McNair, 56 Barb. 77-8.
Wheeler v. Mills, 40 Barb. 644.
Brun v. Eastman, 50 Barb. 639.

People v. Kopplekom, 16 Mich., 342.
Nefzger v. Railway, 36 Ia. 644.
State v. Piper, 17 Neb., 618 & 619.
Adrigone v. McCafferty, 2 Rob. N. Y. 353.

In Lilly v. Tobin, 56 Ala. 122, was a case where there was a petition authorized to be presented to obtain the holding of an election under the local option law. The court say:

"To give the probate judge authority to order an election in such a case a petition must be filed; and the first section of that act declares who may present such petition and what it may contain. This entire proceeding is statutory creating an entirely new jurisdiction unknown to common law and conferring authority on a magistrate of limited and statutory powers not theretofore exercised by him. Under uniform rulings of this court on kindred questions the record must affirmatively show that a petition was filed containing all necessary averments to give jurisdiction to the judge of probate, and nothing can be supplied by intendment. No presumption can be indulged in favor of such proceedings which the record or quasi record does not affirmatively prove. * * * *

"The petition on which the election was ordered was shown to be lost or mislaid. Its contents are proved by the testimony of the ex-judge of probate who ordered the election; and to some extent negatively by the order made when the petition was filed. It was and is fatally defective in not averring that in the opinion of the petitioner the public good will be promoted by a prohi-

bition of the sale or giving away of vinous or spiritous liquors within such limits."

Thus deciding that the requirements of the statute as to the contents of the petition must be followed strictly.

In Tally v. Grider, 66 Ala. 122, which was a proceeding under the local option law applicable to several counties, the court said:

"To give the probate judge authority to order an election, in such case, a petition must be filed; and the first section of that act declares who may present such petition, and what it shall contain. This entire proceeding is statutory, creating an entirely new jurisdiction unknown to the common law, and conferring authority on a magistrate on limited statutory powers, not theretofore exercised by him. Under uniform rulings of this court, on kindred questions, the record must affirmatively show that a petition was filed, containing all necessary averments to give jurisdiction to the judge of probate, and nothing can be supplied by intendment. No presumption can be indulged in favor of such proceedings, which the record, or quasi record, does not affirmatively prove."

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hibition of the sale or giving away of vinous or spiritous liquors within such limits."

Thus deciding that the requirements of the statute as to the contents of the petition must be followed strictly.

The case of Lanier vs. Padgett, 18 Fla. 483, is one directly in point, being a county seat removal case; it was a suit brought for an injunction to enjoin the county board, after the election was held, from passing or adopting an order declaring the county site changed. The allegation of the complaint was that the petition to the Board asking that an election be held did not express a desire for a change nor ask that an election be held to change the location of the county site, but only prayed that an election be called to locate the county site or for the purpose of legally locating the court house.

The act of Florida, cited on page 84, provided: "That the registered voters of any county wishing to change the location of their county site shall present a petition to the Board of County Commissioners of such county signed by one-third of the registered voters *praying for a change of the location of such county site.*"

By Section 2 of the Act it was provided: "That the County Commissioners of any county receiving such petition as above specified shall order an election at the several precincts for the location of such county site, giving at least thirty days notice thereof."

On page 845 of the volume the court say "It is plain that in such cases the Board of County

Commissioners cannot lawfully call an election for a location of the county site unless a petition is presented to them signed by one-third of the registered voters of the county. And from whom must the petition come. It is equally clear that it must come from the registered voters who desire a change of the location. Unless such petition is presented the Board cannot act; that is the precise condition prescribed by the law. A petition asking the Board to call an election for the purpose of legally locating the court house or desiring that the question of the county seat be settled so that suitable buildings may be erected for the business of the county and asking that an election be called for the purpose of locating the county site (as these petitions are variously expressed) do not purport to emanate from or be signed by voters desiring a change of location. For aught that appears in the petitions, none of the signers may have been in favor of a change, as they merely ask that the question of the county seat may be settled and suitable buildings erected, or the court house legally located, and that an election be called for these purposes, and every person signing may have been opposed to any change but merely desired to have a vote which might settle the agitation of the question."

The court held that the petition did not conform to the law and on page 846 the court say: "The result is that the election held under the order of the County Commissioners as alleged was not authorized by law, and the result of the election could not affect a change of the location

of the county site. * * * * An injunction should have been granted.

"The injunction prayed was not to restrain the members of the Board as canvassers of the result of an election, but restrained them from acting upon the result of an unauthorized election. They would, therefore, be not enjoined from doing what the laws required them to do, but from doing an unlawful act. * * * *

"The complainants simply as tax payers in their own behalf and in behalf of other tax payers have a standing which entitles them to a remedy against a threatened wrongful proceeding, which might involve them and the whole people of the county in great expense and confusion and jeopardize the title to property."

This case, while holding that the petition must conform to the requirements of the statute, and is therefore directly in point as to the petition in our case which does not in any manner pray for a change of the county seat or ask that the county seat be changed, or even hint or intimate that it should be changed, but only asks that an election be held to vote on the proposition whether it be changed. The petitioners in our case refrained from asking for a change. Evidently those who promoted the idea of a change saw the difficulty they would encounter in getting signatures if they asked directly for the change and left the question open so that they could apply to persons who would be opposed to the change and ask them simply to join in a petition to vote on the proposition as to whether the change should be made or

not; and it is shown that many persons signed that petition on the representations made to them and the belief they entertained that it was for the purpose of retaining the county seat at Lincoln. This is further borne out by the fact that the number of votes actually cast on the proposition in favor of Carrizozo fell two hundred or more short of the total number of names signed to the petition, and the proof clearly shows that a large number of the men signing the petition did so because they believed they were signing it in the interest of Lincoln as against Carrizozo.

The last paragraph above quoted is very pertinent on another proposition held by the judge of the court below. The judge of the court below apparently held that this suit was an attempt to try a contested election case and not for an injunction against the doing of an illegal act. This is not an injunction to enjoin the canvassing of the result of the election, but to restrain the Board from acting upon that result, being the result of an unauthorized election. The Florida case is directly in point.

But there is another case from Florida of similar import: McKinney vs. Bradford, 26 Fla. 269, et seq. In that case, in 1885, there had been an election to locate the county site of the county on a petition presented to the board for that purpose as alleged. The law of Florida, like our law, did not permit a seceond election under ten years; but in 1887, two years after the former election, the board entertained another petition for a change of the location of the county seat, and or-

dered an election and the taxpayers brought suit to restrain and enjoin the commissioners and the clerk of the circuit court from publishing the order or notice of election locating the county site, or for any purpose having in view the agitation of the question of the removal of the county site, and from holding or ordering an election for said purpose, etc., and from canvassing any votes cast thereat, and declaring the result thereof. An answer was put in admitting generally the prayers of the complaint but alleging that the prayer of the petition was that the county site be changed from Lake Butler to Stark, and not for a change of the location of the county site, and that an election should be called for the purpose of effecting a change. The case was argued and afterwards re-argued, and a great deal of consideration given to it.

On page 273, the court say: "On an application for an injunction a chancellor may go into the merits as disclosed by the bill and which are intrinsic and dependent upon its express allegations and charges."

The court then say: "The bill in this case fails to show that the election of May, 1885, was ordered upon a petition asking for a change of the location of the county seat. It neither alleges expressly that such was the case nor shows the fact by annexing a copy of the petition to it or otherwise. It is true it annexes a copy of the order for the election, but the recital of facts in this order is that the petition prayed for an election to locate the county site. If there was in the

petition any prayer or expression of desire for a change of location of the county site, the bill does not inform us of it. The doctrine of Lanier vs. Paggett, 18 Fla. 482, relied upon by counsel for appellant is decisive of the point that a petition praying for an election to locate the county site is insufficient and that an election ordered upon such petition is void. The fact that the commissioners of 1888 were satisfied that such a petition was regular and in conformity to statutes did not make it so nor give jurisdiction to the Board of County Commissioners of the question of calling an election."

This allegation is very pertinent in this case, because the Board of County Commissioners, although the petition did not contain the same, in their order recited that "A petition having been presented to the Board of County Commissioners which is found to have been signed by qualified electors of Lincoln County, New Mexico, equal in number to at least one-half of the legal votes cast at the last preceding general election in said county, asking for the removal of the county seat of said county to Carrizozo, in said county, and that question of such removal be submitted to a vote of the qualified electors of said county," etc. Thereupon proceeded to order an election to be held "on the 17th of August, 1909," and at said election the tickets to be voted shall contain 'For County Seat————' with the name of the place for which the voter desires to cast his ballot either printed or written thereon. Such ballots shall be canvassed as an election for county officers, and

the return of such election shall be certified by the probate clerk to the Territorial Secretary, together with a certified copy of the order of the County Commissioners and a sworn certificate of the publication thereof to be filed in the office of the Secretary."

It will be seen by this that the commissioners recite that the petition which was presented not only asked that the question of the removal of the county seat be submitted to a vote of the qualified electors, but that the petition itself also prayed for the removal. Such fact as a prayer for the removal can nowhere be found in the petition in evidence.

In the transcript in No. 653, page 37, the statement of facts says:

> "That solely on and pursuant to said petition and its prayers, and for no other reason, the said board by a majority thereof, made an order on the 7th day of July, 1909, calling an election as prayed for in said petition, reciting that a proper piece of land in the town of Carrizozo had been conveyed to the county for said court house, which was accepted."

This statement refers to the petition which is entitled "County Seat Petition" and is copied in full at the bottom of page 36.

In the transcript in No. 889, page 15, the findings of facts, after setting out the petition in full, says:

> "On the 7th day of July, 1909, the Board of County Commissioners of Lincoln County based on said petition above set out, called an

election to be held on the 17th day of August, 1909."

The petition set out is found on that page and reads as follows:

> "We, the undersigned qualified electors of the county of Lincoln in the Territory of New Mexico respectfully petition you to call an election an dsubmit to a vote of the qualified electors of said Lincoln County a proposition to remove the county seat of said Lincoln County to Carrizozo, a town situated on the El Paso & Southwestern Railroad."

and that is the petition which the court in its findings, page 15, say was the only petition presented to said board.

Under the decision last quoted from, the recital of such fact, in the order of the board for an election did not establish such fact. In that case there was a recital that the petition was "regular and in conformity to the statutes." But the court say "That did not make it so, nor give jurisdiction to the Board of County Commissioners of the question of calling an election."

In South. on Stat. Con. 2nd Edition, Sec. 565, it is said:

"A statutory remedy or proceeding is confined to the very case provided for and extends to no other. It cannot be enlarged by construction; nor be made available or valid except on the statutory conditions, that is, by strictly following the directions of the act." See authorities cited in Note 45.

election and submit to a vote of the qualified

The same authority in Sec. 566 says: "The party seeking the benefit of such a statute must bring himself strictly, not only within the spirit, but in the letter; he can take nothing by intendment." Citing Ball vs. Lasting, 71 Ga. 678. St. Paul R. R. Co. vs. Phelps, 26 Fed. 569. Swan vs. Jenkins, 82 Ala. 478.

The same author also in Sec. 572 says: "When a right is given by statute and a specific remedy provided, or a new power and also the means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by statute." See authorities cited.

The mode provided for executing the provisions of Section 630, C. LL., as amended, is first by presenting a petition properly signed which must ask for the removal of the county seat to some other designated place. That is a very plain, simple, common-sense requirement. It requires no effort, no study, nor any exertion of mental capacity, legal or otherwise, to determine what that means. A school boy would easily know. It means to say that the signers in the petition say: "We ask that the county seat of Lincoln county be changed to Carrizozo." This requirement is put in this shape so that the persons who signed the petition will be such as will actually desire or wish the county seat to be changed, not those who might desire the question to be voted upon at a particular time with the idea that they could vote it down and therefore were seeking, by their signatures,

to precipitate an election on that question.

The statement in the petition which was presented, asking the board "to call an election to submit to a vote of the qualified electors of said county of Lincoln the proposition to remove the county seat of said Lincoln county to Carrizozo" is not an application to remove the county seat; but it is an application which apparently presupposes that such a proposition had been inaugurated in the manner required by law and that for some reason the Board of County Commissioners were not acting on it. It is not at all inconsistent with the idea that the signers of that petition simply desired to take some steps to have the question settled for a time. They, not being learned in the law nor in its ways or mode of procedure, and probably not having the law before them when they signed the petition, might naturally suppose that the persons who had gone to the trouble of getting such petition had looked into the law and were following it in its language. They might also naturally suppose or believe that the language of the petition, simply calling for an election to vote on the proposition of change, did not require them to favor the change, but simply to favor getting an opportunity to vote and defeat the question.

The statute evidently intended that the people who might desire the change should have an opportunity to show that they wished the change, and therefore required that the petition should *actually ask for the change.* It did not require

that the petition should ask for the holding of an election to determine the question.

V.

THE ORDER MADE BY THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY FOR AN ELECTION DID NOT SPECIFY THAT THE ELECTION WAS TO BE HELD FOR ANY PURPOSE, AND WAS THEREFORE A NULLITY.

The order made says: "NOW, THEREFORE, in pursuance of the prayer of such petition and in accordance with the facts so found and with the statutes in such case made and provided, it is hereby ordered and directed that an election of the qualified electors of Lincoln County, New Mexico, be held in each of the precincts of said county on the 17th day of August, 1909, and at said election the tickets to be voted shall contain: 'For County SEAT————' with the name of the place for which the voter desires to cast his ballot, either printed or written thereon. Such ballots shall be canvassed as in elections for county officers and the returns of such election shall be certified by the probate clerk to the Territorial Secretary, together with a certified copy of the order of the County Commissioners and a sworn certificate of the publication thereof to be filed in the office of said Secretary."

It will be noticed that this order, which is quoted in full above, does not order as required by Section 630 as amended, "that the proposition to remove the county seat to the place named in the

petition be submitted to a vote of the qualified electors of said county." That is what the statute says the order of the commissioners shall be. The order of the commissioners as made does not order an election for any purpose whatever, much less the one specified in the act of the legislature. This we claim must have been done. The statute directs that the order shall be so made, and the order must express in it, in terms, the purpose for which the election is to be held.

VI.

THE ELECTION WHICH WAS HELD IN ADDITION TO NOT BEING AUTHORIZED BY LAW AND NOT BEING OTHERWISE HELD ACCORDING TO LAW, IS ALSO VOID BECAUSE THERE WAS NO REGISTRATION OF THE VOTERS.

Section 630, Chapter 80, of the alleged laws of 1909, provides: after the presentation of the petition therein provided for shall be made that:

"Said board shall make an order directing that the proposition to remove the county seat to the place named in the petition be submitted to a vote of the qualified electors of said county at the next general election, if the same is to occur within one year of the time of presenting said petition; otherwise at a special election to be called for that purpose at any time within two months from the date of presenting the petition."

The election which was held was not a general election, but was a special election, to be held

within two months from the presentation of the petition.

The petition, such as it was, was presented to the Board on July 6th. The full two months would not expire until the close of September 6th, 1909, or sixty-two days thereafter. The Commissioners on the next day after the presentation of the petition made its order calling the election. On that same day it was within the power of the Commissioners to have appointed the Boards of Registration. They had ample time to provide for the Board of Registration from the date of the presentation of the petition until the sixty-two days of those particular two months should expire.

Section 1709 of the Compiled Laws of 1897, provides:

"Sixty days before ANY election in this Territory, except as provided in Section One Thousand Seven Hundred and Twelve, it shall be the duty of the County Commissioners in their respective counties to appoint three capable persons, as a Board of Registration for each precinct in their respective counties, at least one of whom shall belong to a different political party from that of the said Board of County Commissioners."

Section 1710 also provides:

"It shall be the duty of the Board of Registration to make out in their respective precincts the lists of the legal voters, and these shall not be required to be present when registered."

It has been contended that because the law said that the board should make an order directing the proposition to remove the county seat to the place

named in the petition be submitted to a vote of the qualified electors of the county at the next general election, if the same is to occur within one year of the time of the presentation of said petition; otherwise at a special election to be called for that purpose at any time within two months from the date of presenting the petition, authorizing the Board of Commissioners to ignore the law which required the Board to appoint a Registration Board sixty days before *ANY* election. It is denied that the Board has power to ignore the law, or any law when it is within their power to comply with it. It is admitted that if the law had limited the time for the election to be held less than sixty days from the day of presenting the petition, that no registration would have been required, but it would not have been the Board of County Commissioners that ignored that law, but it would have been the legislature, the same authority that created the law that did it, and which, for that purpose, could have amended the law. The Board of County Commissioners were compelled to take notice that the law of the Territory required the appointment of a Registration Board for every election, when time enough could be given to appoint the Board, sixty days prior to the election. They were compelled to construe the present law in connection with the registration law of the Territory, as laws in *pari materia*, and were obliged to comply with both laws, if they could do so. They could not constitute themselves a legislative body to revoke the law of registration, nor could the Territorial leg-

islature delegate to them the power to do so.

Nor did the legislature intend to do so. It will not be contended and cannot be contended that if the election had been held at a general election, as provided that it might be, if the petition was presented less than a year before the general election, that there need not have been a registration of the voters of that election. Nor can it be contended that if the Board of Commissioners had fixed the election sixty-one or sixty-two days after the presentation of the petition, that there would not have had to be a registration of the voters. A registration of voters has been considered by the legislatures and by the courts as being a purifying measure, with reference to election and one made to facilitate the elections as being a matter of great benefit and aid in holding the election, and as securing the purity of the ballot, so far as voters are concerned. It cannot be contended that in a county seat election, where time enough could have been given to have a registration of the voters, according to law, that it was not intended to so have it, as it is well known that local questions of that kind create more feeling, work up more energy and enterprise and induce more fraud and corruption and illegal voting than any other character of election.

The legislature provided that the election should be held in two months, (not less than sixty nor more than sixty-two days) after the petition was presented, but in ample time to have a registration, can it be contended that the legislature intended that that election should not or might not

be held in accordance with the established and prescribed rules of holding the election and registering voters, if it could be done. Had the legislature intended that no registration should have been made they would have said so, or fixed the time so that it could not have been done. Should not the law be construed as if it read that they should hold the election within sixty days after the presentation of the petition in accordance with the requirements of the law in force regulating registration, if it could be done within that time. They could not have intended to allow the Board the option of including the registration law in the election or excluding it at their election. That would confer upon the Board the right to either execute the law or to ignore it or repeal it temporarily. Such a proposition cannot be entertained. The legislature might have done that, by fixing the time for holding the election less than sixty days, but when they fixed two months as the time, which in this case amounted to sixty-two days, the option of the Board could only have been exercised in fixing the election on the sixtieth, sixty-first, or sixty-second day, because it was possible to comply with the law of registration and absolutely important that it should be complied with, in order to secure the purity of the ballot and facilitate holding the election and the receiving of the ballots of the voters, very essential things to secure in an election of that peculiar character. The legislature certainly did not overlook the fact that in providing two months as the time within which the election should be held that

there was a law providing for the election of voters in *any* election, and it made no attempt to repeal that law but passed the act in question, if it did pass it, so that that law could also be carried into effect for the election. It is not a rule that any law shall be considered as amended or repealed by mere intendment or implication. It only can be done by intendment or implication when the intendment or implication make it absolutely necessary that the law shall stand repealed or amended. There is nothing in this act that shows that the legislature intended that the act in question should operate as a repeal of the registration law for the time being. On the contrary it left the election to be held under the registration law absolutely, if the petition should be presented less than a year before the general election, or of the election to be held sixty days after the petition was presented, and there can be no intendment or implication that the legislature conceived that the circumstances and conditions of any election held after the presentation of the petition would be different from one held sixty days after the presentation of the petition and that therefore there should be such a radical change in the requirement and necessities of the case that the registration should be dispensed with, as a necessary consequence the legislature intended and meant, without doubt, that all the laws of the Territory should be complied with, if it was possible to do so. Otherwise they would have directly dispensed with them in an affirmative manner and not have delegated their authority to a Board of County

Commissioners in a heated county seat question to dispense with them at their will, and as THEY might think, the having of a registration of voters or the not having of it would aid the side of the question they favor.

McCrary in his second edition on elections, Section 193, p. 145, says, that where a registry law is in force, and the legislature passes an act permitting a special election or authorizing one to be called, and the special act says nothing about registration, registration must be had in conformity with the registry law, when there is time given in the special act for such registration to be had, and that an election held without such registration is void. See also Sec. 135, p. 102.

Much more is this the case under statutes like ours which say that in ANY election in this Territory it shall be the duty of the Board to appoint a Board of Registration to register the voters.

Unless the legislature provides for the special election to be held in such limited time only as will not admit of a registration, and will not be within the power of the Board to give time enough to make the registration, the registration law must be complied with; if it is possible, to comply with it it must be done.

State vs. Scarburox, 110 N. C. P. 232.
Smith vs. Board of Co. Comm., 45 Fed. 725.

If the board had the right to fix the time too short in which to have a registration, would they not have the right also to fix the time too short to

appoint judges of election? Could they not also fix the time so short that they could not publish the notice of it? We submit that the only fair construction of that statute is, that the board were given two months in which to make investigation and inquiry as to the signers, etc., and to issue their proclamation for the election and that it was their duty to fix the election so as to comply with the other laws in force regulating the election, especially registration. To hold otherwise would be to confer upon the commissioners the delegated power of legislation to repeal the registration law so far as it applied to that kind of case. But that is a legislative power.

In the 2nd Edition of McCrary on Elections, Sec. 193 it is said: "Where a registry law is in force and the legislature passes an act permitting a special election or authorizing one to be called and the special act says nothing about registration, registration must be had in conformity with the registry law when there is time given in the special act for such registration to be had, and that an election held wtihout such registration is void."

Not only was there time sufficient in which to have a registration if the election was fixed at more than sixty days after the petition was presented, as was meant and intended that it should be, so as to comply with the statute in force, but there was ample time after the call was made July 7 within the two months from the date thereof, to have had the registration. A special statute does not repeal a general one unless there is an

absolute conflict between the two so they cannot stand together. If they can be construed together that must be done.

VII.

THE LOWER COURT SERIOUSLY ERRED IN CASE NO. 653 IN ASSUMING THAT THE ELECTION WHICH WAS HELD WAS BEING DIRECTLY QUESTIONED AND THAT EQUITY HAD NO JURISDICTION IN THE SUBJECT MATTER OF THAT SUIT, APPARENTLY HOLDING THAT NOTHING ELSE WAS INVOLVED EXCEPT THE LEGALITY OF THE VOTES AS GIVEN BY THE VOTERS AND THE CANVASSING OF THOSE VOTES. WHILE SUCH FACT IS A MERE INCIDENT IN THE CASE.

The court of Chancery has always exercised jurisdiction in cases similar with this, unless the statutes of a state working under constitutional authority provided some other tribunal to take jurisdiction. In every case referred to by the court as being against the court of chancery exercising jurisdiction it will be found that it was under a state government having a constitution, permitting the legislature to create judicial tribunals, or quasi-judicial tribunals for the determination of such questions, and where the situation is very different from what it is in a Territory.

In this Territory the Organic Act, which operates as our constitution provides that the judicial power in this Territory shall be vested in a Su-

preme Court, District Courts, Probate Courts and Justice of the Peace and certain courts which may be created in the different counties, over which the judges of the District Courts shall preside, and which last court is given jurisdiction in all cases wherein the United States is not a party.

The legislature of the Territory has no right or authority or power to confer judicial power upon any other body than those mentioned in the Organic Act. It cannot confer upon the Board of County Commissioners any judicial power to determine the validity of an election, or any other judicial questions which may be contraverted. All that the Board of County Commissioners, as a canvassing Board can do, is to canvass the returns that are sent in without crossing a t or dotting an i. They have no right to pass upon, look into o decide in regard to any fraud or illegality. They can only comply with the forms of the law and act as ministerial officers in ordering the election, appointing the registers and judges, receiving and canvassing the returns and announcing the result none of which duties require any judicial action. To pass upon the legality or illegality of any vote or any election is beyond their power and beyond the power of the legislature to empower them to do so.

It is a maxim of law that there is no wrong without a remedy provided for the same. The District Courts for the counties are given a very broad jurisdiction by the Act of Congress. Section 1874, U. S. R. S. says:

"The judges of the Supreme Court of each

Territory are authorized to hold court within their respective districts in the counties wherein by the laws of the Territory courts have been, or may be established for the purpose of hearing and determining ALL MATTERS AND CAUSES EXCEPT THOSE IN WHICH THE UNITED STATES IS A PARTY."

Could language be broader or more extensive? Could the territorial legislature limit or curtail that jurisdiction by conferring some power upon a non-judicial body and making the jurisdiction of that non-judicial body exclusive? That question must answer itself in the negative. In the absence of any express provision in the law providing which arm of the judicial power shall exercise control over the matters of an election in regard to a county seat where fraud, misrepresentation, deception, and corruption have intervened to pollute the election and destroy security, has not the long arm of the chancellor the power to reach out and take it in just as the high court of chancery in England did?

Our Supreme Court has in several instances decided that our chancery jurisdiction was the same as that of the high court of chancery of the court of England.

Hunike vs. Dold, 7 N. M. 11-12.
Garcia y Barela vs. Barela, 6 N. M. 245.

And the Supreme Court of the U. S. in Payne vs. Hook, 7 Wall. 430, and in various other cases has made the same decision. The Supreme Court of

this Territory and the District Court of this Terriry entertained jurisdiction in the case of Barry vs. Hull, 6 N. M. 643, which was exactly a similar case with the one at bar. Where could the trial judge obtain his authority within the scope of equity or judicial jurisprudence in this Territory to say as he did, that the court of equity had no jurisdiction to entertain and determine this case, and that there was no law of this territory which permitted this determination in any court? If that be true what has become of Sec. 1774 U. S. R. S., which says that the courts established in the several counties to be held by the justices of the Supreme Court shall have jurisdiction in *ALL matters and causes except those in which the U. S. is a party.*

To us that is constitutional. Our territorial legislature did not have to confer the power or the authority. It was given to us by that section by Congress and made the Supreme law of this land, unrepealable by the legislature or any other authority, except Congress itself, nor can it be lawfully disregarded by any authority.

VIII.

DEFENDANTS HAVE, BY THEIR PLEADINGS AND FAILURE TO ANSWER CERTAIN ALLEGATIONS OF THE COMPLAINT IN CASE NO. 653, WHICH ARE MATERIAL TO THE CAUSE, ADMITTED THE SAID ALLEGATIONS AS TRUE AND THEY ARE PRECLUDED FROM SETTING UP ANY THING AGAINST THEM, EXCEPT THAT

THEY ARE NOT MATERIAL, AND THE ADMISSIONS THEREBY MADE ARE SUCH THAT PLAINTIFF'S CASE IS THEREBY ABSOLUTELY ADMITTED AND ESTABLISHED.

Sub-Sec. 67 of Sec. 2665 of the C. LL. says: "Every material allegation of the complaint not controverted by the answer and every material allegation of new matter contained in the answer and not contraverted by the reply shall, for the purposes of the action, be taken as true."

The following allegations of the answer are not denied or in any manner otherwise answered, to-wit:

1. The complaint alleges that Chapter 80 of the printed laws of 1909, which was Council Bill No. 86, never was legally enacted.

There is no denial or other answer to the same.

2. The complaint alleges that the election pretended to have been held on the 17th day of August, 1909, under said Chapter 80, in reference to a change of the county seat of the County of Lincoln to Carrizozo was never lawfully held.

There is no denial or other answer to the same.

3. The complaint alleges that there was no petition as required by the said Chapter 80 ever presented to the Board of County Commissioners as preliminary to the holding of said election.

There is no denial or other answer to the same.

4. The complaint alleges that said pretended election for a change of the county seat was in violation of law. No legal petition therefor was presented to said Board of Lincoln County.

This allegation is not denied or otherwise answered.

5. The complaint alleges that in accordance with the provisions of Council Bill 86, which is Chapter 80 aforesaid, the sum of $40,000 was not deposited with the treasurer, or any other sum by any person or persons to build the court house and jail before any election could be held legally to change the county seat, or could be ordered to be held.

This was not denied or otherwise answered.

6. The complaint alleges that the county seat of Lincoln County has never been lawfully located or established at Carrizozo.

This allegation is not denied or otherwise answered.

7. The complaint alleges that the expenditure of the money of the county in the erection of a court house and jail, at Carrizozo, would be illegal and invalid and a total loss to said county.

This is not denied or otherwise answered.

8. The complaint alleges that a quorum of the Board of County Commissioners of Lincoln County, on July 7th, 1909, at a meeting of the said Board, illegally and wrongfully made an order calling an election to vote on the proposition to remove the county seat from Lincoln to Carrizozo, to be held on the 17th day of August, 1909.

This is not denied or otherwise answered.

9. The complaint alleges that the election which was ordered was held on said day without any registration of the voters of the County of Lincoln therefor.

This is not denied or otherwise answered.

Each and every one of the above mentioned allegations, which were not denied or otherwise answered, destroys any defense made by defendants to the action in their pleading, and they each and all or any portion of them establish the right of the plaintiff to the injunction prayed for, as they show that no lawful election was held and that the county seat was never lawfully located at Carrizozo; that no petition as required by that alleged act was ever presented to the Board of County Commissioners, and in fact, that the Board of County Commissioners never possessed any jurisdiction to order said election or cause the same to be held to receive or canvass the votes, to declare the result thereof, or to do or declare anything by which the county seat of Lincoln County was changed from Lincoln to Carrizozo, or located or established at Carrizozo. These allegations, which are admitted by not being denied, needed no proof to establish them. They stood as proof and as an absolute fact as they were alleged, and without the contrary of them being shown or their truth not being admitted in some way, they stand as unquestioned facts to determine the rights of the plaintiff in this case to the relief which they prayed for.

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